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Supreme Court, U.S.
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In The

Supreme Court of the United States

AMANA COMPANY, L.P. doing business as AMANA APPLIANCES, INC.,

Petitioner,

v.

EDEN ELECTRICAL, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case involves the largest punitive award to a single entity ever upheld by the United States Court of Appeals for the Eighth Circuit. This award is five times the largest punitive award ever sustained by the courts of Iowa, whose law was being applied.

Respondent Eden Electrical, Ltd. ("Eden") sued Petitioner Amana Company, L.P. ("Amana") for terminating the parties' fully integrated agreement. Although Amana's termination complied with the 30-day notice provision in the contract, the trial court submitted a fraud claim to the jury based on an oral representation made by an Amana employee that "we are entering this contract in good faith." The jury awarded Eden $2.1 million in compensatory damages for fraud and $17.875 million in punitive damages, which the trial court reduced to $10 million. The Eighth Circuit upheld the $10 million punitive damage award.

The petition presents the following question:

1. Does a punitive damage award of $10 million – on top of $2.1 million in compensatory, lost benefit-of-the-bargain damages – violate due process as a sanction in a commercial contract dispute between sophisticated parties where the reviewing court failed to make specific findings with respect to each of the guideposts enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Amana Company, L.P., now known as Goodman Company, L.P., is a privately held entity with no publicly held entity owning ten percent or more of the ownership interest in it. Pursuant to an agreement to purchase the assets of Amana Company, L.P., Maytag Corporation, a publicly held company, has contractually assumed the responsibility of paying any final judgment against Amana Company, L.P. in this lawsuit.

Respondent Eden Electrical, Ltd. is a privately held Israeli company. Itzhak Eden, Yehezkel Ida, Aharon Ida, Yocheved Rosenbaum, Michal Rosenbaum, and the heirs of Arieh Rosenbaum are all individuals residing in Israel.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE GRANTED	10
I. This Case Exemplifies the Current Disarray in Punitive Damages Review	10
II. The Punitive Damages Award In This Case Is Unsupportable Under This Court's Precedents	15
III. There Is Disagreement and Disarray Among the Circuits, Further Necessitating This Court's Review	21
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES:

2660 Woodley Road Joint Venture vs. ITT Sheraton Corp., 369 F.3d 732 (3d Cir. 2004) 23

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) 25

Conseco Finance Servicing Corp. v. North American Mortgage Co., 381 F.3d 811 (8th Cir. 2004) 20

DiSorbo v. Hoy, 343 F.3d 172 (2d Cir. 2003) 22

In re Exxon Valdez, 296 F. Supp.2d 1071 (D. Alaska 2004) 11, 26

Fabri v. United Technologies Intern., Inc., 387 F.3d 109 (2d Cir. 2004) 21, 22

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004) 24, 25

Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999) 18

Kapelanski v. Johnson, 2004 WL 2674775 (7th Cir. 2004) 24

Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) 23

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) 23, 24

Morse v. Southern Union Co., 174 F.3d 917 (8th Cir. 1999) 13

Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2nd Cir. 2004) 21

TABLE OF AUTHORITIES – Continued

Page

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366 (Fed. Cir. 2003) 25

Southern Union Co. v. Southwest Gas Corp., 281 F. Supp.2d 1090 (D. Ariz. 2003) 12, 26

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

Stogsdill v. Healthmark Partners, L.L.C., 377 F.3d 827 (8th Cir. 2004) 19

TVT Records v. Island Def Jam Music Group, 279 F. Supp.2d 413 (S.D.N.Y. 2003) 26

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) 19, 20

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996) 22

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) 20, 24, 25

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend V 1

STATUTES:

28 U.S.C. § 1254 1

28 U.S.C. § 1332 1

Iowa Code § 714.8 17

OTHER AUTHORITIES:

Restatement (Second) of Torts §§ 537, 542 16

Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171 (2004) 18

OPINIONS BELOW

The opinion of the Eighth Circuit is published at 370 F.3d 824 and is reproduced in the Appendix at 1-9. The opinion of the district court reducing the punitive damage award from $17.875 million to $10 million is published at 258 F. Supp.2d 958 and reproduced in the Appendix at 10-44.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered on May 28, 2004. Amana timely petitioned for rehearing en banc. Amana's petition was denied on September 9, 2004 over the dissent of two judges. App. 46. On September 22, 2004, the Eighth Circuit granted a stay of its judgment, thereby finding that the certiorari petition "would present a substantial question and there is good cause for a stay." Fed. R. App. 41(d)(2).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. The district court had jurisdiction pursuant to 28 U.S.C. § 1332.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves a $10 million punitive damages award, in addition to the jury's award of $2.1 million in compensatory damages, against a manufacturer that terminated its distributor in compliance with the parties' fully integrated, written distribution agreement. The $10,000,000 represents the largest punitive award that the Eighth Circuit has ever upheld to a single entity.

1. Plaintiff Eden owns approximately 25 electronic appliance stores throughout Israel. According to its principal, Eden has the premier network of electronics stores in Israel.[1]

In 1998, Eden was selling various appliance lines, including Amana refrigerators, in its stores. Eden purchased its Amana merchandise from the existing Amana distributor in Israel; however, as Eden knew, that distributor was undergoing significant financial and legal problems.

On or about January 31, 1998, Leon Adam, the principal of the troubled Amana distributor, approached Eden about becoming Amana's new distributor in Israel. One of Adam's companies owed Amana $2.4 million for a purchase of refrigerators. Adam explained that if Eden would put up the money to pay for these refrigerators, it could become the new Amana distributor in Israel. Meanwhile, that inventory of refrigerators was being stored in a warehouse in New Jersey. Because of their voltage, the refrigerators were suitable for sale only in Israel and

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[1] According to an Israeli business magazine, Eden is currently in negotiations to merge its network of 25 stores with another retail chain.

certain other European countries. Most of the refrigerators had become outdated since Adam had ordered them. According to Adam, both he and Amana executives referred to the inventory colloquially as "junk." Eden does not dispute that it knew the inventory was largely outdated.

On or about February 1, 1998, Itzhak Eden (the principal of Eden) and his attorney reviewed Adam's existing distributorship agreement with Amana. That agreement was terminable "at any time for any reason" upon the giving of proper notice.

From February 9, 1998 through February 15, 1998, two Eden managers met and negotiated with Adam in New York regarding arrangements to purchase the $2.4 million refrigerator inventory. Itzhak Eden was not present because he was making a business trip to Asia.

Early on February 16, 1998, these two Eden representatives traveled to Iowa with Adam to meet with Amana's executives. This was the first time that any Eden representative had contact with Amana itself.

At the meeting in Iowa, Eden's representatives presented a check (for approximately $1.2 million) and a letter of credit (also for approximately $1.2 million) to cover the purchase of the $2.4 million refrigerator inventory. Eden and Amana also signed a distributorship agreement. This contract was in all material respects identical to Adam's existing distributorship agreement that Itzhak Eden and his attorney reviewed. However, while the typewritten version of the contract allowed termination by either party on 180 days' notice, Amana

made a handwritten change to reduce the required notice period to 30 days.[2]

Eden questioned the handwritten change, and Steve Prusha, a territory sales manager in Amana's international department, responded as follows:

> Well, you can tell them that we are entering this contract in good faith and that should something happen that it would need to be terminated, either they would want out of the contract or Amana would want out of the contract, it would be for something that was quite serious.

Eden approved the 30-day change. Notwithstanding Prusha's statement, there is no dispute that Eden knew at the time of signing that the distribution agreement was terminable by either party "at any time for any reason" on 30 days' notice.

The agreement also had an integration clause. The clause specifically provided that the agreement "contains the final and complete understanding governing the business relationship existing between the parties" and that it "supersedes and cancels all prior Agreements, written or oral."

On May 4, 1998, 77 days after signing the distribution agreement, Amana terminated the agreement effective June 3, 1998, in compliance with the termination clause. Following the termination, Eden sold the inventory for

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[2] If not terminated on notice, the agreement was set to expire at the end of 1999.

$300,000 to $315,000 more than it had paid for it, *i.e.*, for approximately $2.7 million.[3]

After Eden was terminated, Amana appointed Crystal Consumer Products, Ltd. as its distributor in Israel. In December 1997, Amana had received an order from Crystal for 5,100 refrigerators to be produced between April and August 1998 and sold under the "Blomberg" name.

2. Eden sued Amana in the United States District Court for the Northern District of Iowa alleging various state law fraud-type theories. Before trial, the district court dismissed most of Eden's fraud claims against Amana. Among other things, the court held that in light of the express 30-day notice provision in the written distributorship agreement, Eden as a matter of law could not prove it had reasonably relied on any alleged misrepresentation regarding the duration of the distributorship. The court also rejected Eden's claim that Amana had committed fraud by misrepresenting that Eden would be its exclusive distributor. In the court's view, Eden could not prove any damages caused by this alleged misrepresentation.

However, at the end of the trial, the district court instructed the jury on two theories. First, the court told the jury it could find for Eden if Amana had misrepresented that it was "in good faith seeking Eden Electrical to become its exclusive distributor in Israel" and the other elements of fraud were proved. The genesis of this theory is hard to understand. Eden had never pled this theory.

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[3] Itzhak Eden does not dispute this testimony of his accountant, but claims that he lost $1.247 million on the inventory when various other matters are taken into account.

Indeed, Eden objected to the district court's proposed "good faith" instruction. In its evidence and in closing argument, Eden tried this case on the basis that Amana had misrepresented that the relationship between Eden and Amana would be direct, long term, and exclusive – all theories that the district court disallowed as a matter of law. Eden never mentioned Mr. Prusha's solitary "good faith" statement in the district court proceedings, attaching significance to it for the first time in response to Amana's brief in the Eighth Circuit.

Second, the district court instructed the jury on a theory of fraudulent nondisclosure. The court told the jury it could find for Eden if it found Amana had developed, but failed to disclose, a pre-contract scheme to terminate Eden.

The jury found for Amana on this nondisclosure claim. On the "good faith" fraud claim, however, the jury returned a verdict for Eden, awarding $2.1 million in compensatory damages and $17.875 million in punitive damages.[4]

3. Amana moved for a reduction in the punitive damage award based on both federal constitutional requirements and Iowa law. The district court did not make independent factual findings. Instead, the court quoted at length from Eden's brief (App. 15-23) and then concluded, "The Court agrees that a reasonable jury could, on the basis of the evidence, have found the facts in accordance with the Plaintiff's just quoted summary." App. 24.

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[4] Eden's compensatory damages were based on lost benefit of the bargain, *i.e.*, the profits it claimed it would have earned from a distributorship through the agreement's stated December 31, 1999 expiration date.

The district court then performed a legal analysis, purporting to follow this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The district court made the following points:

- This case involves "economic harm, rather than a physical harm"; "Amana's conduct appears to be an isolated incident"; and Eden "was, and is, a large, successful enterprise."
- Eden "received a substantial compensatory damages award: $2.1 million."
- The maximum fine for Amana's conduct, if punished criminally, would have been $10,000.[5]
- "There was no reckless disregard of the health or safety of the Plaintiff."
- "Plaintiff was not a financially vulnerable entity, but rather a sophisticated and highly-successful Israeli business."
- "[I]t does not appear that Amana will have any future dealings with Dr. Adam."
- The Amana division at issue has now been purchased by a separate corporation (Maytag Corporation), and most of the Amana executives in question (including Prusha) do not work there any longer.

App. 33, 37, 38-39.

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[5] The district court was in error: There is no Iowa criminal statute applicable to the conduct alleged in this case. The criminal provisions cited by the district court cover 18 specific "fraudulent practices," such as altering or defacing a serial number. None of those practices has anything to do with this case.

Yet, despite all of these points, which should have necessitated a dramatic reduction in the punitive damage award, the district court let most of that award stand. It reduced punitive damages only from $17.875 million to $10 million.

The district court relied on two considerations in sustaining a $10 million punitive damage award. First, although it acknowledged that all the other aspects of the first *Gore* guidepost counseled against a substantial award (*i.e.*, no physical harm, no reckless disregard of the plaintiff's health or safety, not a financially vulnerable entity, and no repeated conduct), it said that it could "hardly think of a more reprehensible case of business fraud." App. 39, 41. Second, the court said that "if the punitive damages award is to have any punitive or deterrent effect – the stated rationale of such damages – then it is apparent that Amana's wealth and financial condition *must* be taken into consideration." App. 41 (emphasis in original). Given Amana's net worth of $325 million, the court concluded that the U.S. Constitution permitted $10 million (or 3 percent of that amount) to be awarded to Eden. App. 43. As the district court put it:

> If the punitive damages sanction is to continue to meet its twin aims [of punishment and deterrence], must not a court consider who is to be punished or deterred when ascertaining whether an award is constitutionally permissive? This question answers itself because an award that would effectively punish and deter General Motors or Bill Gates would have to be many, many, many times greater than an award which would adequately punish and deter, say, the local one-store druggist.

App. 41. The district court went on to comment that Finnish law has embraced this concept by making speeding ticket fines vary in amount depending upon the driver's income. App. 42.

4. Amana appealed to the Eighth Circuit. There, it challenged both the amount of the punitive damage award and the district court's decision to instruct the jury on a "good faith" misrepresentation theory that had been neither pled nor included in the pretrial order. The Eighth Circuit affirmed on both issues.

The Eighth Circuit devoted a total of four paragraphs to the substance of its analysis of Amana's punitive damages challenge. App. 6-8. Though it cited this Court's precedents, the Eighth Circuit did not review the punitive award by analyzing each of the guideposts this Court enunciated in *Gore* and *State Farm*. The court entirely overlooked the third guidepost – comparable civil or criminal penalties that could have been imposed by the state. Its discussion of the first guidepost – reprehensibility – merely parroted some of the facts that offended the district court. App. 6-8. The Eighth Circuit concluded that Amana's conduct was "egregious" and "extraordinarily reprehensible" and noted that it had affirmed "similar compensatory-to-punitive damage ratios in other [pre-*State Farm*] non-personal injury cases." App. 7-8. Accordingly, while conceding that the compensatory damage recovery was "significant" and that "this is a commercial case," it upheld the $10 million punitive damages award. App. 8.

Amana petitioned for rehearing en banc. The Eighth Circuit denied rehearing en banc, although two judges

would have granted rehearing. App. 46. This petition followed.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. This Case Exemplifies the Current Disarray in Punitive Damages Review.

Punitive damages jurisprudence is now at a crossroads. Over the last decade, this Court has articulated specific constitutional limits on awards of punitive damages. Yet a great many lower courts have strained, evaded, or simply ignored this Court's enunciations of due process constraints on punitive damages awards. Today it is hard to think of an area of the law in which this Court's decisions are given less allegiance than punitive damages. The Eighth Circuit here strayed far from this Court's teachings. This case gives this Court an opportunity to reassert control over a socially important area of the law.

This Court's recent decisions are seemingly plain: Punitive awards must be measured against three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). This Court also has explained what the first *Gore* guidepost, reprehensibility of conduct, means. Five factors are to be considered: (1) actual or threatened physical violence; (2) an indifference to or reckless disregard for health or safety; (3) financial

vulnerability of the plaintiff; (4) repeated as opposed to isolated conduct; and (5) trickery or deceit as opposed to mere accident. *Id.* at 576-77; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

Additionally, two terms ago, this Court strongly disapproved "high ratio" punitive damage awards in cases involving substantial compensatory damages. In *State Farm*, this Court noted:

- A punitive-to-compensatory ratio in excess of four-to-one "might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425.
- "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

While a majority of this Court apparently believes that the *Gore*/*State Farm* standards can be followed by federal and state judges, another view has been expressed that they are "insusceptible of principled application." *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting). *See also Gore*, 517 U.S. at 606 (asserting that the Court's *Gore* framework "does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair'") (Scalia, J., dissenting).

Unfortunately, recent decisions since *State Farm* strongly indicate that the system is not working as this Court intended. Decisions have been "all over the map," with no apparent decline in the overall number of astronomical punitive awards. *See, e.g., In re Exxon Valdez*, 296

F. Supp.2d 1071 (D. Alaska 2004) (reducing punitive award only from $5 billion to $4.5 billion, on "actual harm" of $513 million); *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp.2d 1090 (D. Ariz. 2003) (upholding $60 million in punitive damages on $390,072.58 of compensatory damages, for a ratio of 153:1). At times, judicial review of punitive awards is methodical and dispassionate, tracking the analytical framework laid out in *State Farm* and *Gore*. Yet on other occasions, as in this case, punitive damage verdicts stand or fall based simply on judges' gut reactions to the defendants' conduct. Courts that engage in this subjective approach claim to be applying the "reprehensibility" analysis of *Gore*, but in reality these courts are ignoring most of this Court's teachings – not only the five-factor *Gore* reprehensibility analysis, but also the other two *Gore* guideposts and the *State Farm* pronouncements regarding the ratio between punitive and compensatory damages.

This "house divided against itself" should not be permitted to stand. A punitive damage review that depends haphazardly on which court, panel, or member of a court hears a case is arguably worse than no review at all. Moreover, punitive damage review needs to be cabined at all times by defined legal standards. Allowing judges to serve as mere moral arbiters of "reprehensibility" when they review punitive damage awards is bad for society (and for the judges themselves). The Constitution may not require the courts to construct some elaborate version of Dante's *Inferno* for punitive damage defendants, with precise concentric circles of bad behavior corresponding to exact levels of punitive damage awards. But punitive damage review needs to be something better than a judge's intuitive judgment unconstrained by precedent.

This case illustrates everything that is wrong with current punitive damage review. With only four paragraphs of discussion, the Eighth Circuit upheld the largest punitive award in its history to a single plaintiff – five times larger than the courts of Iowa have ever approved in any case. The Eighth Circuit gave no reason for sustaining the $10 million award other than its view of the reprehensibility of Amana's conduct. Aside from *State Farm*, which we respectfully submit the Eighth Circuit mischaracterized, the Eighth Circuit cited only one precedent – a pre-*State Farm* decision that upheld a $400,000 punitive award in a discrimination case. *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir. 1999). To district courts within its seven-state jurisdiction, the Eighth Circuit has now signaled that so long as the defendant's conduct was "egregious," it will sustain a 4.5:1 punitive-to-compensatory ratio even in a business tort case involving purely economic harm and millions of dollars in compensatory damages.

As we discuss below, the Eighth Circuit is not alone. The current system is a mess, with some courts taking *Gore* and *State Farm* literally; others embarking on their own analysis based on what they think *Gore*/*State Farm* really means (or should mean); and still others just making ad hoc judgments about whether conduct is sufficiently egregious to justify particular awards.

This Court should accept this case and fix punitive damage review. This case presents this Court with an opportunity to adopt two rules, either of which would result in meaningful improvement. First, this Court should hold that in cases where compensatory damages are substantial – say, six figures or above – an award of punitive damages that exceeds compensatory damages is

presumptively unconstitutional unless the reviewing court makes specific findings regarding each of the *Gore/State Farm* guideposts (including the subparts of the reprehensibility guidepost) which warrant a higher punitive award. Second, this Court should hold that the highest previous punitive damage award affirmed by the highest court of a state sets the presumptive ceiling for any federal award under that state's law.

Both of these rules, we believe, are faithful to *Gore* and *State Farm* and would have dramatically altered the outcome in this case. In any event, the punitive damage review process needs to be a regular one where this Court's standards are consistently applied, even in business tort cases. Otherwise, this federal constitutional review may not be worth undertaking and this Court should simply leave the traditional state law punitive damage review in place. Since the Iowa courts have never upheld a punitive award greater than $2 million in *any* case, it is unfathomable that *they* would have permitted a $10 million award in this diversity case had Eden decided to file there.[6]

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[6] If this Court's punitive damage line of cases had never been decided, Amana believes that the reviewing courts in this case would have made a far more substantial reduction of the award to Eden under longstanding Iowa precedents. As it was, the Eighth Circuit simply and mistakenly merged review under Iowa law with review under federal constitutional law. Then the court misinterpreted what the U.S. Constitution requires. App. 5-8. Notably, if Eden had filed in its home jurisdiction of Israel, where any harm was actually suffered, it would have been barred from recovering any punitive damages.

II. The Punitive Damages Award In This Case Is Unsupportable Under This Court's Precedents.

The Eighth Circuit's reported decision represents a stark, but by no means isolated, departure from the punitive damages jurisprudence approved by this Court. The sparse opinion in this case effectively dislodges judges from their constitutional role and makes them additional jurors. None of the factors identified in *Gore*/*State Farm* could support a large punitive award here.

1. The first *Gore* guidepost is degree of reprehensibility. Here, four of the five reprehensibility factors favor the defendant in this case. As even the district court found, this case involves only a lost benefit of a commercial bargain, not physical harm; nobody disregarded anyone's health or safety; the plaintiff was and still is a large, successful business; and there was no evidence of repeated conduct. App. 33, 38-39.

This leaves the final factor under the first *Gore* guidepost – whether the harm was the result of malice, trickery, or deceit, or mere accident. A critical point here is that defendants should be punished only for their actionable conduct. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm*, 538 U.S. at 423. But there is a stunning lack of nexus between the legal basis of Eden's recovery and the evidence presented at trial. The sole claim on which Eden prevailed was the allegation that Amana affirmatively misrepresented that it was entering into the distributorship agreement in good faith. The entire trial record contained exactly one cursory statement to this effect: the remark by Amana employee Prusha. Eden's counsel did not even mention this statement in

closing argument, preferring instead to belabor an elaborate "lie chart" filled with alleged statements unrelated to the "good faith" representation.

Eden's decision not to argue Prusha's "good faith" comment to the jury made sense, because it was arguably not even actionable. What kind of company decides to enter into a large commercial contract based on the other side's oral representation of "good faith"? *See* Restatement (Second) of Torts § 537 (stating that reliance must be justifiable); *id.* § 542 (stating that a fraudulent representation of opinion by an adverse party is generally not actionable). The reality is: Companies routinely sign contracts for various reasons that they deem advantageous. This contract had an integration clause. Eden's counsel reviewed the form of this agreement before Eden signed it. Had Eden wanted to avoid the possibility of getting stuck with the former distributor's inventory but without an ongoing distributorship, it could have demanded other contract terms. Willing to sacrifice certainty for a shot at Amana's business, Eden elected not to do so. Indeed, the trial judge agreed with Amana to a point, dismissing most of Eden's misrepresentation case on the ground that it was barred by the terms of the contract. But for the "good faith" representation made by Mr. Prusha, this case would have ended in favor of the defendant.[7]

To summarize, Amana's conduct ranked relatively low on the reprehensibility scale. Only the trickery or deceit

[7] As noted above, Eden alleged other misrepresentations such as the duration and exclusivity of the distributorship agreement, all of which the district court ruled would not support recovery as a matter of law. The jury also returned a verdict for Amana on Eden's nondisclosure claim.

factor was implicated, based only on a single misrepresentation of "good faith"; this was an isolated incident inflicting solely economic injury; and Eden was a sophisticated commercial entity with 25 retail stores. The only conduct that actually harmed Eden was the exercise of a contractual right of termination.

2. The second guidepost from *Gore* is the ratio between the punitive and compensatory awards. Here, too, the Eighth Circuit went in its own direction, leaving *Gore/State Farm* far behind. In *State Farm*, this Court made it clear that when compensatory damages are substantial, a lesser ratio than four-to-one – perhaps one-to-one – "can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. Allowing the 4.5:1 multiplier here – in a case which is at the very bottom of constitutionally sustainable fact patterns – flies in the face of this language.

The Eighth Circuit relied upon its own "affirmance of awards with similar compensatory-to-punitive damages ratios in other non-personal injury cases,"App. 7, but then cited only a single (pre-*State Farm*) decision in support of its point. And that case did not involve an award of substantial compensatory damages.

3. The third *Gore* guidepost is wholly absent from this case. The Eighth Circuit did not mention it.

The district court referred to the third guidepost but got the law wrong. It commented that Amana's conduct, "if punished criminally," could have resulted in imprisonment and a $10,000 fine. But the criminal statute cited by the district court does not conceivably apply to the "good faith" misrepresentation alleged here. *See* Iowa Code § 714.8. Even if there were some theoretically applicable Iowa

criminal statute (which there is not), no real-world prosecutor would ever have brought charges against Amana for making a false representation about "good faith." *See Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999) (third *Gore* guidepost must be based on realistic evaluation of likely penalty to be imposed by state). Nor would the possibility of a $10,000 fine remotely place Amana on notice that it could be required to pay a punitive damage award of one thousand times that much. *See State Farm*, 538 U.S. at 428.

* * *

The jury made a huge award against Amana because it was apparently angered by the overall evidence presented at trial. For a jury, this kind of reaction may be understandable, but the judiciary has a constitutionally mandated responsibility to serve as a corrective. Juries predictably will be outraged by documents that contain profanity or otherwise reveal malicious intent.[8] A court, however, should do more than to act as a super-juror by layering its feelings of outrage on top of the jury's. Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 186-87 (2004).

Making matters worse for any party concerned about equity and fairness is what the Eighth Circuit did *after* rendering the panel decision in this case. In succession this past summer, the Eighth Circuit reduced punitive damages, to a ratio of less than the 4.5:1 here, in three cases involving more offensive facts:

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[8] Former Israel distributor Adam – not an Amana employee – used the profanity and other inappropriate language quoted by the Eighth Circuit.

- *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827 (8th Cir. 2004) – a wrongful death case. As the Eighth Circuit pointedly observed, *Stogsdill* involved "not merely economic injury." *Id.* at 832. Rather, a nursing home staff had been "conscious[ly] indifferen[t] to [an elderly resident's] life-threatening change in condition," resulting in "a perforated bowel, the worst case of abdominal contamination her surgeon had ever seen, and death." *Id.* Moreover, there was "a practice of careless and sometimes fraudulent charting of residents' condition[s]." *Id.* Nonetheless, the Eighth Circuit held the Due Process Clause required punitive damages to be reduced from $5 million to $2 million (on a $500,000 compensatory damage award).

- *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) – a racial discrimination case. An African-American plaintiff was subjected to years of "racially demeaning language" and "graffiti with racist messages" at his workplace. *Id.* at 795. The employer had a "pervasive practice of using a double standard" between white and black employees for evaluations, discipline, privileges and work assignments. *Id.* at 795, 798. This pattern of workplace harassment directly affected the plaintiff's work assignments and negatively affected his relationships with his family. *Id.* at 795. Nevertheless, the Eighth Circuit held that the U.S. Constitution required reduction of the plaintiff's punitive damage award from

$6,063,750 to $600,000 (on a $600,000 compensatory damage award).[9] *Id.* at 798, 799.

- *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811 (8th Cir. 2004) – a business tort case. As part of a nationwide scheme, the defendant used confidential customer files stolen from the plaintiff to deprive the plaintiff of business. The defendant's wrongdoing was "widespread and systematic," involving "multiple offices" and "numerous groups of employees." *Id.* at 824. Rather than take corrective action, the defendant used the initial instance of wrongdoing as a "model" for its other offices. *Id.* The defendant acted with "trickery and deceit, and an utter disregard for [the plaintiff] and – even more heinously – the privacy of its customers." *Id.* Still, the Eighth Circuit concluded that the $18 million punitive damage award had to be reduced to $7 million, resulting in a two-to-one punitive-to-compensatory ratio. *Id.* at 825.

Taken collectively, these results indicate that the Eighth Circuit has apparently taken an ad hoc view of punitive damages; that that court apparently believes there is no need to reconcile one punitive damage decision with another; and that a defendant may be tagged with a huge sum of punitive damages, even if compensatory damages

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[9] *See Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003) (holding that intentional discrimination is more reprehensible than the fraudulent conduct involved in *Gore* and *State Farm* because "intentional discrimination is a different kind of harm, a serious affront to personal liberty," and noting that this nation "fought the bloodiest war in its history in part to advance the goal of racial equality").

were very large and only economic loss is involved, so long as the reviewing judges believe conduct was sufficiently "egregious."

III. There Is Disagreement and Disarray Among the Circuits, Further Necessitating This Court's Review.

The problems necessitating this Court's intervention go far beyond this single decision and the Eighth Circuit. Since *State Farm*, lower courts have taken a wide range of irreconcilable approaches to punitive damage awards. A look only at the approaches to punitive damages in the circuits, setting state and district courts aside, demonstrates the growing chaos in this area of the law.

In one of its decisions, the Second Circuit has condemned exactly the approach taken by the Eighth Circuit in this case. In *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2nd Cir. 2004), Motorola provided approximately $2 billion in financing to the defendants based on "numerous false statements." *Id.* at 43. In addition to awarding $2.1 billion in compensatory damages, the court entered judgment for the same amount of punitive damages ($2.1 billion). Although that case involved repeated, fraudulent conduct (and even endangerment of health and safety to the extent that Motorola executives were arrested on trumped-up charges), the court reversed the punitive award because the district court had simply based it on its view of the reprehensibility of the defendants' conduct, without full consideration of the *Gore*/*State Farm* factors and particularly the absolute size of the awards. *Id.* at 63.

In *Fabri v. United Technologies Intern., Inc.*, 387 F.3d 109 (2d Cir. 2004), the same court did something different.

It considered the full panoply of *Gore/State Farm* factors but ultimately relied on a lack of "notice" to the defendant based on a comparison to absolute levels of punitive damages previously approved by the Connecticut courts. The case involved an Argentinian sales representative for a manufacturer who sued the manufacturer after being terminated in accordance with the parties' contract but for unethical reasons (*i.e.*, so that the manufacturer could avoid paying the representative a commission on a particular sale). The jury awarded $1 in damages and $500,000 in punitive damages. Although the Second Circuit found that the defendant's conduct involved malice and repeated actions, it reversed the punitive award. *Id.* at 125-27. It found particularly significant the fact that the Connecticut courts had never approved an award greater than $340,000 in a case involving neither bodily injury nor a pattern of misconduct that affected entities other than the plaintiffs. Thus, the defendant "would not have been on notice that its conduct could trigger a punitive damages award of $500,000." *Id.* at 127.

By that notice standard, the $10 million award in this case could not possibly stand, because Iowa courts have never upheld more than $2 million in punitive damages in *any* case. And the $2 million award came in a case that involved threats to personal health and safety and repeated misconduct. *See Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (en banc).[10]

[10] In *DiSorbo v. Hoy*, 343 F.3d 172, 175, 189 (2d Cir. 2003), another post-*State Farm* case, the Second Circuit reduced punitive damages from $1.275 million to $75,000 (on $250,000 in compensatory damages) despite "disturbing allegations of police brutality."

The Third Circuit seems to have taken this Court close to its word. In *2660 Woodley Road Joint Venture vs. ITT Sheraton Corp.*, 369 F.3d 732 (3d Cir. 2004), it set punitive damages at $2,025,000 (thus maintaining the 1.5:1 ratio adopted by the district court) after reducing the compensatory damages to $1,350,000 for a kickback scheme. The court cited *State Farm* in a footnote. *Id.* at 745 n. 19.

The Fifth Circuit took a different approach in *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). There it decided that the jury's award should have been reduced to the applicable civil penalty ($55,000). The Fifth Circuit used that penalty as the outer limit even though the plaintiff there had been the victim of the defendant's pattern of racial discrimination, conduct which the Fifth Circuit viewed as more serious than mere economic injury. *Id.* at 293-94. By that standard, Amana should have been penalized no more than the $10,000 penalty that the district court claimed was applicable (although it was not).

Differently still, the Seventh Circuit has read this Court's punitive damage decisions as lessons in economics. In *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), it upheld awards of $186,000 each to two plaintiffs where compensatory damages were not substantial – $5,000 apiece. The court acknowledged that punitive damages "should be admeasured by standards or rules rather than in a completely ad hoc manner." *Id.* at 676. The court then concluded that the large ratio was warranted in that case because the defendant had committed outrageous and recidivist behavior (*i.e.*, knowingly renting motel rooms infested with bedbugs) for which the compensable harm to any individual was relatively slight. *Id.* at 677. The lack of potential for a substantial compensatory recovery made individual suits difficult and merited

use of a substantial punitive award as a deterrent. But the court specifically observed that when punitive damages are sought for huge economic injuries, the considerations that warrant punitive damages "fade." *Id.*

Then, in *Kapelanski v. Johnson*, 2004 WL 2674775 (7th Cir. 2004), the Seventh Circuit sustained an award of $331,250 on $100,000 in compensatory damages where the defendant essentially stole the plaintiffs' money and converted it to personal use – a scenario that easily could have been prosecuted criminally. Judging from these opinions, the Seventh Circuit would not have sustained a large award in this case. But its economics-based approach diverges from that taken by other circuits.

Contrary to these other courts, the Ninth Circuit has adopted the view that *Gore* and *State Farm* afford courts "considerable flexibility" so long as the punitive-to-compensatory damage ratio is less than ten-to-one. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004); *see also Zhang*, 339 F.3d at 1044. Thus, while the Ninth Circuit (unlike the Utah Supreme Court) read *State Farm* as approving only a one-to-one ratio in that particular case, *Hangarter*, 373 F.3d at 1014, the Ninth Circuit in the two cited cases upheld punitive damage awards of $5 million and $2.6 million, respectively, where the ratios were in the single digits. The Ninth Circuit thus utilized yet another approach to punitive damages – *i.e.*, an approach different from that used by any of the Second, Third, Fifth, or Seventh Circuits. It

is difficult to predict how the punitive award here against Amana would have fared in the Ninth Circuit.[11]

The Eleventh Circuit seems to believe that ratios of four-to-one or less are acceptable under *State Farm* if conduct is reprehensible, even if actual damages are high. In *Bogle v. McClure*, 332 F.3d 1347, 1359, 1362 (11th Cir. 2003), it upheld punitive awards totaling approximately $13.3 million, on approximately $3.5 million in compensatory damages, to a group of white librarians who were discriminated against. There the defendants used trickery and deceit to cover up their actions under the guise of reorganization.

Lastly, in the business tort case of *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), the Federal Circuit adopted a superficial and simplistic approach akin to that of the Eighth Circuit here. Despite a remand from this Court to reconsider its earlier decision in light of *State Farm*, the Federal Circuit adhered to its position that a $50 million punitive award was proper. *Id.* at 1368. The Federal Circuit interpreted *State Farm* as *generally* allowing a four-to-one punitive-to-compensatory ratio before the punitive damage award becomes even "suspect." *Id.* at 1372. Despite the purely commercial nature of the loss, a $15 million compensatory damage verdict *by itself* justified the $50 million in punitive damages. The Federal Circuit concluded that "this low ratio of punitive to compensatory damages award [3.33:1] lies well within the bounds of constitutional propriety." *Id.*

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[11] Both *Hangarter*, a bad faith denial of disability benefits case, and *Zhang*, a racial discrimination case, involved more reprehensibility factors than this case.

In summary, the federal appellate court system is currently a hodgepodge of disparate approaches. We make this observation without even taking into account the divergent tests applied by state courts and federal district courts under *Gore / State Farm*. *Compare In re Exxon Valdez* and *Southern Union, supra, with TVT Records v. Island Def Jam Music Group*, 279 F. Supp.2d 413 (S.D.N.Y. 2003) (reducing punitive awards to approximately the level of compensatory damages).

But of all of the approaches to regulating punitive damages described here, the approach in this case is easily the worst: A visceral reaction to the trial evidence accompanied by a passing reference to – but not adherence to – this Court's clearly stated principles for resolving such cases. This Court has the opportunity not only to right the wrong done in this case but to provide guidance to the lower courts that they obviously need in this area of the law.

In *State Farm* this Court stated that, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. The Eighth Circuit ignored that statement in deciding this case. Numerous other courts around the country are doing the same.

As we discuss above, this Court should hold that in cases where compensatory damages are substantial, an award of punitive damages that exceeds compensatory damages is presumptively unconstitutional unless the reviewing court makes specific findings regarding each of

the *Gore/State Farm* guideposts (including all subparts) justifying a higher punitive award. Alternatively, or additionally, this Court should hold that the highest punitive award upheld by the state's highest court provides a presumptive upper limit for punitive damages when the award of compensatory damages is based on that state's law. Amana is confident that either analysis would result in a substantially lower punitive award here.

CONCLUSION

This Court should grant a writ of certiorari and reverse the judgment and decision of the United States Court of Appeals for the Eighth Circuit regarding punitive damages.

Respectfully submitted,

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370 F.3d 824

United States Court of Appeals,
Eighth Circuit.

EDEN ELECTRICAL, LTD., Plaintiff/Appellee,

Itzhak Eden; Yehezkel Ida; Aharon Ida;
Yocheved Rosenbaum; Michal Rosenbaum;
Arieh Rosenbaum Heirs, the wife, daughter and
heirs of Arieh Rosenbaum, Plaintiffs,

v.

AMANA COMPANY, doing business as
Amana Appliances, L.P., Defendant/Appellant,

Richard Montross, Individually;
Steve Prusha, Individually; Leonard Mason, Individually;
Bruce Boyle, Individually, Defendants,

United States Chamber of Commerce,
Amicus on Behalf of Appellant.

Eden Electrical, Ltd., Plaintiff/Appellant,

Itzhak Eden; Yehezkel Ida; Aharon Ida;
Yocheved Rosenbaum; Michal Rosenbaum;
Arieh Rosenbaum Heirs, the wife, daughter
and heirs of Arieh Rosenbaum, Plaintiffs,

v.

Amana Company, doing business as
Amana Appliances, L.P., Defendant/Appellee,

Richard Montross, Individually;
Steve Prusha, Individually; Leonard Mason, Individually;
Bruce Boyle, Individually, Defendants,

United States Chamber of Commerce,
Amicus on Behalf of Appellee.

Nos. 03-2123, 03-2188.

Submitted: March 12, 2004.
Filed: May 28, 2004.
Rehearing and Rehearing En Banc Denied Sept. 9, 2004.*

Mark E. Weinhardt, Des Moines, IA, argued, for appellant/cross-appellee.

Kevin Heath Collins, Cedar Rapids, IA, argued, for appellee/cross-appellant.

Before WOLLMAN, FAGG, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

This appeal arises out of a distributorship agreement between Amana Company, L.P., doing business as Amana Appliances, Inc. (Amana) and Eden Electrical, Ltd. (Eden). In return for Eden's purchase of $2.4 million in inventory, Amana agreed to make Eden its exclusive distributor in Israel. Eden brought suit, alleging fraud, after Amana abruptly terminated the agreement seventy-seven days after its signing. The jury returned a verdict in favor of Eden, awarding it $2.1 million in compensatory damages and $17.875 million in punitive damages. Amana appeals, arguing (1) that a number of the district court's[1] jury instructions were improper and (2) that the punitive damages award, although reduced by the district court to $10 million, violates due process and Iowa law. Eden cross-appeals, arguing that the district court erred in reducing the punitive damages award. We affirm.

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* Judge Morris Sheppard Arnold and Judge Gruender would grant the Petition for Rehearing En Banc. Judge Melloy and Judge Colloton did not participate in the consideration or decision of this matter.

[1] The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, sitting by designation in the Northern District of Iowa.

I.

At the time of the acts complained of, Eden owned twenty-five appliance stores throughout Israel, at least some of which sold Amana refrigerators, which Eden purchased from Amana's Israeli distributor, Pan El A/Yesh Shem, which was owned and controlled by Leon Adam. As a result of certain legal and financial problems on the part of Adam and Pan El A/Yesh Shem (including a $2.4 million debt another Adam-controlled company owed Amana), Amana needed a new distributor for Israel. Adam approached Eden about possibly taking over the Israeli Amana distributorship. After considering the proposal, Eden decided to send a number of representatives to meet with Amana executives in Iowa. Eden's representatives traveled to Iowa, met with Amana executives, signed the distributorship agreement, and delivered to Amana's executives a check for $1.2 million and letter of credit in the same amount. During the negotiations, Amana executives, including a territory manager, the international credit manager, and a vice president, made a variety of assurances to Eden's representatives about Amana's good faith, its hope of having a long-term business relationship with Eden, and its willingness to have a direct business relationship with Eden as its exclusive distributor in Israel.

Seventy-seven days after the agreement was reached and payment was made, Amana terminated the distributorship contract without any explanation. Eden's attempts to make contact with Amana were met with no response. Unbeknownst to Eden, which believed it was embarking on a long-term relationship as Amana's exclusive distributor, Amana had, following the execution of the agreement, continued selling refrigerators to other entities for the

Israeli market and had represented to others that it was still looking for a long-term distributor for Israel. Eden eventually brought suit, alleging fraud in the inducement. Following a thirteen-day trial, the jury returned the above-described verdict in favor of Eden.

II.

We review the district court's jury instructions for abuse of discretion. *Brown v. Sandals Resorts Intern.*, 284 F.3d 949, 953 (8th Cir.2002). Our review is limited to a determination of whether the instructions fairly and accurately present the evidence and law to the jury given the issues in the case. *Id.* Where a party contends that an improper instruction was given to the jury, reversal is appropriate only where the erroneously given instruction affects substantial rights. *Id.*

Amana first argues that the district court's fraudulent misrepresentation jury instruction was not supported by the evidence and was legally erroneous because Amana had never represented that it was acting in good faith. This contention rings hollow, however, in light of the testimony of one of Amana's officers that he had expressly told Eden's representatives that Amana would deal with them in good faith. Additionally, Amana complains about the district court's decision to give both a fraudulent misrepresentation instruction as well as a fraudulent nondisclosure charge. Contrary to Amana's contention that the two charges were duplicative, the evidence adduced at trial supported the giving of both instructions. The district court reasonably determined that a jury might find (as it ultimately did) that Amana actively misrepresented its

good faith but did not commit the distinct act of failing to communicate other information it was obliged to disclose.

Amana next argues that the district court erred in instructing the jury about how the actions of Amana's agents could be imputed to it to form the basis of its fraud. Specifically, Amana argues that the conduct of its agents Prusha, Mason, and Boyle should not have been considered because the individual fraud claims against them had been dismissed at summary judgment. Amana cites no case for the proposition that a corporation's fraud must be committed entirely by a single agent. It is simply not necessary that the entire scheme of fraud be perpetrated by a particular individual. Rather, it is the actions of the corporation as a whole, executed by its agents individually or collectively, that must satisfy the essential elements of the fraud claim. Accordingly, we find no error in the court's instruction.

III.

We review de novo the district court's determination regarding the constitutionality of a punitive damages award. *Ross v. Kansas City Power & Light, Co.,* 293 F.3d 1041, 1048 (8th Cir.2002). Because the Iowa Supreme Court's opinions track the United States Supreme Court's due process holdings, *see, e.g., Wilson v. IBP, Inc.,* 558 N.W.2d 132, 147 (Iowa 1996), the same analysis is utilized in examining the legality of the punitive damage award under both federal and state due process principles. *Id.*

The United States Supreme Court has held that we must look to three factors in determining whether a punitive damages award is so grossly excessive as to violate due process: the reprehensibility of the conduct

complained of, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award (often expressed as a ratio), and the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Because the most important of these factors is the reprehensibility of the defendant's conduct, *id.,* the Supreme Court has elaborated on several factors relating to the wrongfulness of the defendant's conduct: whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

Having reviewed the record, we agree with the district court that a punitive damages award of $10 million under these facts comports with due process and Iowa law. In conducting its due process analysis, the district court stated that "the Court can hardly think of a more reprehensible case of business fraud. Because of Amana's 'intentional malice, trickery, [and] deceit,' this case certainly falls at the high end of reprehensibility in the economic harm category of punitive action claims." D. Ct. Order of April 21, 2003 (footnote omitted). Amana's conduct was not accidental or inadvertent. The scheme to defraud Eden involved various members of Amana's leadership team, including a vice president, the international credit manager, and a territory manager. Leon

Adam testified that he had numerous conversations with Amana's vice president Montross about the "Eden project," "the only purpose of which was to get rid of the [$2.4 million worth of] inventory which commonly we called . . . junk." Amana's leadership directed Adam to find someone in Israel "who can take the junk." He was instructed to offer the exclusive distributorship as a way of selling "the junk" to someone who had the requisite cash available. Upon receiving this request from Amana, Adam identified and contacted Eden. Amana's actions were purposefully designed to maliciously victimize another company, all the while giving Eden the impression that it was entering into a long-lasting and mutually profitable relationship. Amana entered into the agreement with Eden, then ignored all communications from Eden (including an attempt to place additional orders for Amana appliances) and failed even to deliver to Eden the $2.4 million worth of inventory it had purchased. Eden's was the briefest exclusive distributorship in Amana's history. Even after Eden received the faxed two-page termination letter, Amana refused to discuss the situation.

Given the egregious nature of Amana's conduct and our affirmance of awards with similar compensatory-to-punitive damages ratios in other non-personal injury cases, we conclude that the $10 million punitive damage award is appropriate. *See, e.g., State Farm,* 538 U.S. at 419-20, 423, 123 S.Ct. 1513 (stating that punitive damages at or near the level of compensatory damages appropriate even in the absence of evidence of repeated conduct or reprehensibility); *Morse v. Southern Union Co.,* 174 F.3d 917 (8th Cir.1999) (affirming punitive damage award in age discrimination case where ratio was greater than 4:1 where upper management was involved in the discrimination

scheme). We acknowledge that Eden's compensatory damage recovery was significant and that this is a commercial case. But as has been noted, this was an extraordinarily reprehensible scheme to defraud. Amana's agents expressed the desire to "f* * *" and "kill" Eden after taking its $2.4 million. Amana's own agent characterized its actions as "extreme." Accordingly, we conclude that the ratio of slightly more than 4.5:1 does not offend due process and that the award appropriately furthers the state's twin goals of punishment and deterrence. *State Farm,* 538 U.S. at 416, 123 S.Ct. 1513.

Amana argues that the punitive damages award should be set aside because the jury considered conduct that occurred outside of Iowa: specifically, that Adam approached Eden in Israel and some of the resulting negotiations occurred there. We are not persuaded by this argument. The jury found that Amana committed fraud through its agents, including Adam. The record shows that Amana's leadership was located in Iowa, met with representatives of Eden in Iowa, took Eden's $2.4 million payment in Iowa, and in Iowa made the decision to fraudulently enter into and then terminate the distributorship agreement. Adam's actions in Israel were certainly in furtherance of the fraudulent scheme, so his conduct is closely related to Eden's harm. *State Farm,* 538 U.S. at 422-23, 123 S.Ct. 1513. Additionally, there is no indication that Amana's conduct was lawful under Israeli law. *Id.* at 421, 123 S.Ct. 1513.

In sum, then, we find no constitutional impediment to the enforcement of the punitive damage award as ultimately determined by the district court.

Eden argues in its cross-appeal that the district court erred in reducing the punitive damage award. We disagree. Granted that Amana was guilty of malice, trickery, and deceit, this is a case of economic rather than physical harm. Amana's conduct did not evince a disregard for the health or welfare of others, and the fraud involved only a single incident and a single victim. *See Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589. Given the constitutional constraints imposed by the Supreme Court's holdings in *Gore* and *State Farm,* we agree with the district court that a punitive damage award greater than $10 million would run afoul of the due process principles set forth in those cases.

The judgment is affirmed.

258 F.Supp.2d 958

United States District Court,
N.D. Iowa,
Cedar Rapids Division.

EDEN ELECTRICAL, LTD., et al. Plaintiff

v.

AMANA COMPANY, L.P., d/b/a Amana Appliances, Inc. and Richard Montross
Defendants

No. C00-80.

April 21, 2003.

Kevin H. Collins, Diane Kutzko, Shuttleworth & Ingersoll, Cedar Rapids, IA, for Plaintiff.

Eric W. Lam, J. Michael Weston, Randall D. Armentrout, Brenda K. Wallrichs, Moyer & Bergman, PLC, Cedar Rapids, IA, Margaret C. Callahan, Mark E. Weinhardt, Belin Lamson McCormick Zumbach Flynn, Des Moines, IA, for Defendants.

MEMORANDUM OPINION AND ORDER

EISELE, District Judge.

I. Background

The above styled matter came on for trial before the Court and a jury in January 2003. On January 31, 2003, the jury returned the following verdicts:

> (1) On the Plaintiff Eden Electrical's fraudulent misrepresentation claim against the Defendant Amana, did the Plaintiff prove all eight of the propositions

listed in Instruction No. 13 by a preponderance of the clear, convincing and satisfactory evidence? **YES**.

(2) On the Plaintiff Eden Electrical's fraudulent misrepresentation claim against the Defendant Richard Montross, did the Plaintiff prove all eight of the propositions listed in Instruction No. 13 by a preponderance of the clear, convincing and satisfactory evidence? **NO**.

(3) On the Plaintiff Eden Electrical's fraudulent nondisclosure claim against the Defendant Amana, did the Plaintiff prove all nine of the propositions listed in Instruction No. 14 by a preponderance of the clear, convincing and satisfactory evidence? **NO**.

(4) On the Plaintiff Eden Electrical's fraudulent nondisclosure claim against the Defendant Richard Montross, did the Plaintiff prove all nine of the propositions listed in Instruction No. 14 by a preponderance of the clear, convincing and satisfactory evidence? **NO**.

(5) What sum will fairly and justly compensate the Plaintiff Eden Electrical for the actual damages it sustained, if any, as a result of Amana and/or Richard Montross's fraudulent conduct? **$2.1 million.**

(6) On the Plaintiff Eden Electrical's punitive damages claim against Defendant Amana, did the Plaintiff prove by a preponderance of the clear, convincing and satisfactory evidence that Amana's conduct constituted a willful and wanton disregard for the rights of another, as defined in Instruction No. 25? **YES**.

(7) Was Defendant Amana's conduct directed specifically at the Plaintiff Eden Electrical? **YES**.

(8) What sum of punitive damages, if any, do you award against Amana? **$17.875 million.**

On February 3, 2003, the District Court Clerk entered three judgments in this matter: (1) per the jury's verdicts, in favor of the Plaintiff as against only Separate Defendant Amana; (2) per the jury's verdicts, in favor of Separate Defendant Richard Montross; and (3) per the Court's grants of summary judgment, in favor of Separate Defendants Steve Prusha, Leonard Mason and Bruce Boyle.

Presently before the Court is the Separate Defendant Amana's Motion to Alter or Amend Punitive Damages Judgment (Doc. # 237). The Plaintiff timely responded and Amana submitted a reply brief. After the Supreme Court of the United States released its opinion in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416-18, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 (2003), both parties filed supplemental briefs at the Court's invitation. On April 17, 2003, the Court conducted an in-court hearing on the pending motion.

As the Supreme Court has suggested, this Court has conducted a "meaningful" trial-court level review of the jury's award of punitive damages in an effort to determine whether it violates Iowa law and whether it withstands a federal constitutional inquiry. *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 20, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *see also Ross v. Kansas City Power & Light Co.,* 293 F.3d 1041, 1048 (8th Cir.2002) ("The district court was required by the Due Process Clause to undertake an examination of the punitive damages award."). After considering the relevant case law, the record, and the written and oral arguments of the parties, the Court concludes that the jury's award of punitive damages is constitutionally excessive, and that Amana's motion must be granted in part and denied in part.

II. Discussion

The jury found the Separate Defendant Amana liable on an Iowa state-law claim of fraudulent misrepresentation, and awarded actual and punitive damages to the Plaintiff pursuant to Iowa law. Amana now contends that the Court should eliminate, or at least reduce, the punitive damages award under two theories: (1) the award is excessive under Iowa law; and (2) the award is constitutionally excessive under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The question of whether a punitive damages award should be reduced as excessive under state law lies with the sound discretion of this Court. *See Rustenhaven v. American Airlines, Inc.,* 320 F.3d 802, 805-06 (8th Cir.2003). The question of whether a punitive damages award should be reduced as constitutionally excessive is one of law for the Court. *See Ross,* 293 F.3d at 1048.

The Supreme Court of the United States has identified factors for this Court to consider in determining whether a punitive damages award is excessive under the Fourteenth Amendment's Due Process Clause. *See BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Because Iowa courts also utilize the *Gore* framework to test the excessiveness of a punitive damages award under the state law of Iowa, Amana has confined both its state and federal arguments to the *Gore* analysis. *Citing Wilson v. IBP, Inc.,* 558 N.W.2d 132 (Iowa 1996). The Court agrees that Amana's approach to the issue is appropriate. *See Asa-Brandt, Inc. v. Farmers Co-Operative Society,* No. C01-3021, 2002 WL 1714197, at *6 (N.D.Iowa May 10, 2002).

As a threshold matter, the Court notes that while compensatory damages are intended to redress the concrete loss that a plaintiff has suffered by reason of a defendant's wrongful conduct, punitive damages serve the broader functions of deterrence and retribution. *See State Farm,* 538 U.S. 408, 416-18, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585. As the Supreme Court of Iowa has likewise noted: "Punitive damages serve as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy." *McClure v. Walgreen Co.,* 613 N.W.2d 225, 230 (Iowa 2000) (internal quotation omitted). Because the jury awarded compensatory damages in the instant case, the Court accepts that the Plaintiff has been made whole for its actual losses: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment and deterrence." *State Farm,* 538 U.S. 408, 419, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585.[1]

Before undertaking its *Gore* analysis, Amana argues that "Eden's entire case . . . portrayed Montross as the ringleader of a clandestine scheme to defraud Eden. According to Eden, Montross dispatched Adam to offer

[1] In oral arguments, the Plaintiff argued that the Court need not presume that a plaintiff has been "made whole" by the compensatory damages award when considering whether a punitive damages award is constitutionally excessive. *Citing State Farm,* 538 U.S. 408, 426, 123 S.Ct. 1513, 1524-25, 155 L.Ed.2d 585 ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."). The Court disagrees with this argument in view of other quoted language from the *State Farm* opinion.

Eden an Amana distributorship, while harboring a hidden intent to cancel the contract after Eden purchased Adam's inventory." Amana contends that because the jury did not find Mr. Montross personally liable, the punitive damages award "could only be designed to punish Amana for misrepresentations made solely and entirely by Adam." Amana notes that this is a "tenuous position" because Mr. Eden testified that he did not rely on Dr. Adam's representations, and because there was no evidence submitted at trial that Amana knew of Dr. Adam's misrepresentations to the Plaintiff. Furthermore, Amana argues that it is difficult to perceive how Amana could be liable for Dr. Adam's misrepresentations in view of the integration clause of the distributorship agreement.

The Plaintiff disagrees with Amana's position that it was punished solely for the conduct of Dr. Adam: "Contrary to the suggestion of Amana, its reprehensible conduct was committed not only by Leon Adam but also by several other Amana agents, including high-ranking Amana officers." With citation to the evidence proffered at trial, the Plaintiff describes Amana's fraudulent scheme as follows:

> Amana's Vice President of International Sales Richard Montross instructed Leon Adam to find a "sucker" upon whom Amana could unload uncertain outdated inventory. . . . Adam chosen Eden Electrical. Amana representatives (including Leon Adam, Manager of International Credit Leonard Mason, and Territory Sales Manager Steve Prusha) promised Eden Electrical an exclusive, long-term distributorship with a direct business / credit relationship, in exchange for the purchase of certain inventory for $2.4 million. Eden Electrical was appointed as Amana's distributor on February 16, 1998.

In April 1998, Vice President Richard Montross and Leon Adam discussed the effect of terminating Eden Electrical pursuant to their fraudulent plan. Montross' handwritten notes of their conversation on April 28th reflect the following advice from Adam: "Israeli courts [sic] only remedy against foreign manufacturers is to allow some time to transition." (Exhibit 163). On that same day, Adam sent a document entitled "Confidential Remarks" to Montross. (Exhibit 164). This document, produced from Amana's files, also discusses the legal effects of Amana's fraudulent scheme:

> STRATEGY: please disregard the previous 3-pages TRIDENT's termination letter – as it was generated before Eden's April 27 letter to Amana. INSTEAD, a different approach which looks more liberal and fair should be taken. . . .
>
> 3. This Strategy will probably cause Eden (if at all) to sue in Israel (TRIDENT or the NEW DISTRIBUTOR), as they cannot sue Amana in Israel. See paragraphs M + N (arbitration – Iowa, jurisdiction – Iowa) . . . .
>
> LEGAL: Israeli Law protects very strongly foreign manufacturers' rights and appointments. The only remedy/compensation given by the courts is TIME (usually providing 30 to 180 days for transition). We are not worried about any legal proceedings or resulting marketing disturbances against the NEW DISTRIBUTOR or TRIDENT itself. Any Claim against Amana placed in Israel will probably be initially dismissed. . . . [T]he 30-days and 5-month non exclusive was designed to show a very soft – fair approach of Amana, to block in advance any possible claims with a high probability of success.

(Exhibit 164).

On May 4, 1998 (a mere 77 days after appointing Eden), Amana terminated Eden's distributorship. Eden had not even received the inventory (which it later learned to be outdated) at the time of its termination.

Eden's termination was executed pursuant to a two-sentence letter signed by Vice President Montross. (Exhibit 28). Montross' letter afforded absolutely no explanation for the termination.[2] (Exhibit 28).

Immediately upon receipt of the termination letter, Itzhak Eden called Montross seeking an explanation. Montross secretly recorded the call (which was the first call between the two men). During that call, Montross refused to meet with Eden, saying that he did not "see the need."

Eden Electrical then faxed numerous letters to Amana seeking an explanation for its termination. Specifically, Eden Electrical sent: a May 7, 1998 letter to Goodman's President Thomas Burkett and Amana's Senior Executive Vice President Peter Alexander (Exhibit 169); a May 10, 1998 letter to Richard Montross (faxed by Montross to General Counsel Paul Dobrowski) (Exhibit 170); a May 12, 1998 letter to Thomas Burkett and Peter Alexander (Exhibit 173); a May 12, 1998 letter to Richard Montross and Leonard Mason (Exhibit 174); and a May 18, 1998 letter to Richard Montross and Leonard Mason (Exhibit 176). In those letters, Eden Electrical explained that it had

[2] The Court notes that this letter stated in pertinent part: "Dear Sir: In accordance with our agreement, we are hereby exercising our rights . . . and terminating our agreement regarding distribution of Amana Appliances effective 30 days from today's date. We wish you the best in your future business endeavors."

not received the inventory and that it was incurring significant damages on a daily basis.

It is undisputed that Amana's officers made no response to Eden Electrical's letters. Amana's attitude is reflected in Vice President Montross' handwritten notes on his copy of Eden's May 18th letter: "Should we answer any point?" (Exhibit 176).

Amana's attitude is also reflected in Vice President Montross' comments during his second phone call with Itzhak Eden, which Montross again secretly recorded. During that call, Montross told Eden that he (Montross) had not responded to the faxes "because we have nothing to say." (Exhibit 177). Montross also told Eden that he would not even provide written documentation that the inventory had been produced in the United States, documentation that Montross knew was necessary to remove the goods from the port and that only Amana could provide.

Only eight days after Eden's termination was effective, Amana officially appointed Crystal Consumer Products as its distributor in Israel. (Exhibit 196). Amana had promised the distributorship to Crystal prior to appointing Eden. (Exhibit[s] 72, 140). Crystal still serves as Amana's distributor.

These facts demonstrate that Amana never had any intention of having Eden Electrical serve as its distributor in Israel. . . .

As indicated above, high ranking Amana officers told numerous lies to Eden Electrical in furtherance of the fraud. The Manager of International Credit (Leonard Mason) and Territory Manager (Steve Prusha) both wrote false letters to Eden Electrical to induce the company to enter into the distributorship agreement.

Leonard Mason (Manager of International Credit) wrote a false letter to Eden Electrical on the day of the closing (February 16, 1998). While Mason's letter purported that it was given "as a clarification and to avoid misunderstandings and confusion," it contained several lies. (Exhibit 18). First, the letter stated that Amana held title to certain inventory and would transfer title to Eden Electrical. As Mason testified at trial, those statements were false. Mason's letter also stated that Eden Electrical would have a "direct business and credit relationship" with Amana. Mason admitted at trial that he had no intent to honor that promise either. While Defendant's Motion suggests that none of Mason's misrepresentations were material, that simply is not true. As several Eden Electrical representatives testified and as several documents reflect, Eden Electrical would not have entered into the distributorship agreement without Amana's promise of a direct business/credit relationship. Mason's promise of a direct business/credit relationship was indeed material. It also strains belief to argue that representations regarding the ownership and title of inventory purchased for $2.4 million were of no significance to the purchaser.[3]

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[3] Amana disagrees that Mr. Mason's letter contained falsehoods: "The letter does not state that Eden Electrical 'would have' a direct business and credit relationship with Amana; the letter actually states 'Eden Electrical, Ltd. will establish a direct business and credit relationship with Amana.' Eden fails to explain this distinction. Nothing in the letter indicated the distributorship would be anything other than terminable-at-will. It should also be kept in mind that this letter was presented to Eden before the contract was signed by both parties, and thus, it was superceded by the full, integrated agreement." The Court disagrees with Amana's analysis. The record is clear that the Plaintiff was demanding a direct business and credit relationship, and Mr. Mason's letter in response could readily have been viewed by the jury as having been proffered with an intent to mislead. And though the

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Territory Sales Manager Steve Prusha also gave a false letter to Eden Electrical on the day of closing. Prusha's letter promised that Eden would serve as Amana's "exclusive distributor" in Israel. (Exhibit 47). As several witnesses testified, Eden Electrical would not have entered into the distributorship agreement without promises of exclusivity. Prusha's promise of exclusivity was a lie. Unbeknownst to Eden Electrical, when Amana was promising an exclusive distributorship to Eden, Amana already had orders from another company (Crystal) for Amana-manufactured refrigerators to be sold in Israel. Also unbeknownst to Eden Electrical, on the day that Amana signed an exclusive distributorship agreement with Eden, it signed an agreement with Leon Adam allowing him to sell Amana-manufactured refrigerators in Israel. Both Amana's agreement with Crystal and Amana's agreement with Adam were directly contrary to the terms of Eden's distributorship agreement as well as Prusha's letter.

In addition to lying to Eden Electrical, Amana's officers told lies regarding the Israeli distributorship to the court-appointed receiver in Israel. It is undisputed that both Amana's General Counsel Matthew Clark and its Territory Sales Manager Prusha wrote false letters directed to the Israeli receiver.[4]

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contract contained an integration clause, the letter was presented at the same meeting where the contract was executed and could be interpreted as part of the scheme to induce the Plaintiff to enter into the distributorship agreement so that Amana could obtain the $2.4 million payment.

[4] Amana contends that the fact that its agents allegedly lied to a court-appointed receiver in Israel is irrelevant, and cannot be a basis for any punitive damages award. The Court concludes that this evidence is relevant because it shows that Amana's agents had no qualms about lying, even to court-appointed officials. More importantly,

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On the very day that Eden Electrical was appointed as Amana's exclusive distributor, Amana's General Counsel (Matthew Clark) wrote a letter to the court-appointed receiver in Israel. Clark's letter stated: "Amana is actively searching for an experienced distributor to replace Pan-El." (Exhibits 2, 129). There is no question but that Clark's statement to the receiver was a lie. There is also no question but that Clark's letter was part of Amana's fraudulent scheme. The letter is referenced in Leon Adam's agenda for the February 16, 1998, meeting, which was sent to Steve Prusha. (Exhibit 16). Clark's letter is also referenced in Leon Adam's "summary" of events, provided to Amana on February 22, 1998. (Exhibit 13A).

Similarly, on February 5, 1998, Territory Sales Manager Prusha wrote a letter stating: "Please be advised Amana will be seeking a replacement distributor that has had prior experience in the marketing and sale of refrigeration products." (Exhibit 11). Prusha admitted during trial that his statement regarding the distributorship was a lie. Prusha also admitted that he included the lie at the request of Leon Adam and that he understood that Adam would present the false letter to the court-appointed receiver in Israel.

Amana's officers also told a number of lies during this litigation. Amana's Former General Counsel Paul Dobrowski and Vice President of International Sales Richard Montross lied in answers to interrogatories. On behalf of Amana, Montross verified an answer to interrogatory stating that Amana had not conducted an investigation of Eden Electrical's termination prior to filing the lawsuit (May 2000). (Exhibit 215). The answers were signed and served on Plaintiff's counsel

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these misrepresentations were related to the carrying out of the overall fraudulent scheme.

by Attorney Paul Dobrowski, who had previously served as Amana's General Counsel and was then serving as Amana's outside counsel. Contrary to the sworn answer, Dobrowski had ordered and Montross had participated in an investigation back in 1998.

Amana officers continued to tell lies during the trial. For instance, Amana's Chief Financial Officer Bruce Boyle, Vice President Richard Montross, and Territory Manager Steve Prusha all lied about the handwritten changes to Eden Electrical's contract. The facts regarding the changes are as follows. After Eden signed the distributorship agreement, Amana representatives Prusha and Mason took the agreement outside the presence of the Eden representatives where Boyle made certain handwritten changes. As a result of the handwritten changes, the notice provision was changed from 180 days to 30 days. (Exhibit 17). Boyle, Montross, and Prusha all testified at trial that the handwritten changes were made pursuant to a new company policy. There [sic] testimony was false, as revealed by the following undisputed facts: 1) Eden distributorship agreement is the only exclusive distributorship agreement in the history of Amana with a 30-day notice provision; 2) Eden's successor (Crystal) was given a 180-day notice provision (signed by the president of the company who supposedly set the policy); 3) There was no written company policy on the issue; and 4) Eden's distributorship was terminated 77 days after it began. . . .[5]

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[5] Amana disagrees with the Plaintiff that the change in the notice provision from 180 days to 30 days is relevant, especially to the question of punitive damages. However, the Plaintiff is right. The representation that the change of the notice provision was pursuant to a mere company-wide change in policy, coupled with the representations that the Plaintiff could expect to have the distributorship for decades like Dr. Adam's companies, must be put in context of the overall

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Amana officers also gave false testimony regarding the source of the $2.4 million. Vice President Richard Montross and Manager of International Credit Leonard Mason both testified that back in February 1998, they believed that the $2.4 million was Leon Adam's funds. Several pieces of evidence revealed that their testimony was false. First, Bruce Boyle (Amana's CFO) testified (upon questioning by the Court) that in February 1998, he knew that the funds did not come from Leon Adam. According to Boyle's testimony, he knew that the funds came from the investor (Eden Electrical). Second, Amana knew in February 1998 that if it accepted funds from Leon Adam, those funds could well be set aside as fraudulent transfers under the bankruptcy laws. (Exhibit 116). Third, the week before Amana accepted the $2.4 million in question, Amana sued Leon Adam's company (Williams International), accusing Adam of being a cheat, a fraud, and a thief. (Exhibit 31). If Adam were the type of businessman alleged in Amana's pleading, why would Amana go into business with Adam seven days later? Fourth, Amana confirmed with the bank that the source of the funds was Eden Electrical, not Leon Adam. (Exhibit 128).

During the trial of this case, Manager of International Credit Leonard Mason also admitted that he had lied in other litigation as well. According to Mason, when he filed an affidavit in Amana's New Jersey lawsuit against Leon Adam's company, he lied about the value of the inventory at issue.

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fraudulent scheme. Amana's agents' reassuring but false explanations of the reasons for the change were intended (so the jury could have found) to mislead and to lull the Plaintiff into going forward with the sham distributorship agreement.

The Court agrees that a reasonable jury could, on the basis of the evidence, have found the facts in accordance with the Plaintiff's just quoted summary. Amana's presentation of the facts on the issue of punitive damages in both its briefs and its oral argument was entirely too narrow, as explained *infra*. The alleged fraudulent scheme was that Amana harbored a desire to appoint Crystal as its new Israeli distributor, but Crystal was unwilling to liquidate Dr. Adam's $2.4 million debt by purchasing the Amana appliances held by Dr. Adam's company in New Jersey. A scheme was devised to find a "patsy" to purchase said inventory in return for a sham distributorship, which would be terminated once Amana was paid the $2.4 million. Certainly events occurring subsequent to the execution of the contract are relevant to the operation of the scheme, and could have properly been considered by the jury on the issue of reprehensibility.

The Court disagrees with Amana's argument that the jury chose to punish it solely for the conduct of Dr. Adam. First, evidence was presented that the Plaintiff heavily relied on the statements regarding exclusivity and a direct relationship made by the Amana officials on the day of the execution of the distributorship agreement at Amana's headquarters. Second, based upon the evidence presented at trial, the jury could have reasonably concluded that the alleged fraudulent scheme (originated by Dr. Adam and Mr. Montross) was orchestrated and supported by various levels of officials within the Amana management hierarchy. The fact that the jury did not find Mr. Montross personally liable to the Plaintiff,[6] and that the Court

[6] No one can say with certainty why the jury did not find Mr. Montross personally liable. *See infra*.

granted summary judgment to Messrs. Mason, Prusha and Boyle, does not exonerate them from being considered active participants in the fraudulent scheme, nor foreclose that Mr. Montross orchestrated the scheme. In fact, based upon the finding of liability against Amana, it is not possible to creditably argue that these individuals played no role in the fraudulent enterprise. As the Court noted in its January 30, 2003, Order, a corporation acts only through its agents, and the conduct of the individual Defendants could establish Amana's fraud. Messrs. Mason, Prusha and Boyle were dismissed from this matter because the Court concluded that a *prima facie* case of fraud could not be proven separately against any of these individuals, primarily because the Plaintiff relied upon the overall representations of Amana made through these individuals, not upon the representations of these individuals standing alone.[7] Likewise, the jury's verdicts in favor of Mr. Montross only meant that the Plaintiff failed to prove to the jury's satisfaction the eight *prima facie* elements of fraudulent misrepresentation and the nine *prima facie* elements of fraudulent nondisclosure.[8] The Court's January 30, 2003, Order stated: "The law does not require that any one Amana agent satisfy all the *prima facie* elements of a fraudulent misrepresentation or a

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[7] This is consistent with Mr. Eden's testimony that he was not relying *per se* on Dr. Adam's representations, but rather on Amana's representations made through its agents.

[8] In order for Amana to be held liable on the fraudulent nondisclosure claim, the jury would have had to conclude that "special circumstances existed which gave rise to a duty of disclosure between Amana and the Plaintiff." *See* Jury Instruction No. 14. The jury held Amana liable on the fraudulent misrepresentation claim. It is important to note that a "misrepresentation . . . may include silence." *See* Jury Instruction No. 15.

fraudulent nondisclosure in order for Amana to be liable; rather, any particular agent may satisfy an element, so long as all elements are in fact satisfied. . . . The jury may reasonably consider the conduct of Messrs. Boyle, Mason and Prusha on February 16, 1998, to satisfy one or more of the necessary *prima facie* elements. For this reason it is proper to instruct the jury as to their status and conduct as regards agency principles."

The Court also disagrees with Amana's contention that it cannot be liable for Dr. Adam's misrepresentations in view of the integration clause of the contract. This is a lawsuit for fraud, not breach of contract. The pre-contract fraudulent understanding between Dr. Adam, Mr. Montross and other Amana officials vitiates the effectiveness of the contract's provisions. The Plaintiff was willing to abide by the contract provisions on the explicit and implicit understanding that the contract was entered into in good faith and would be implemented on such basis. The jury found for the Plaintiff on the fraudulent misrepresentation theory, and the evidence supports such a verdict.

In its reply brief and its oral argument, Amana disputes the Plaintiff's reliance on Amana's agents conduct post-February 16, 1998 (i.e., the date the distributorship contract was executed). The Court disagrees. Amana's conduct post-February 16, 1998, was clearly in furtherance of the overall fraudulent scheme. The scheme was complete only once the distributorship agreement was terminated and Crystal appointed the new distributor. In any event the conduct could have properly been considered by the jury as circumstantial evidence of the fraudulent scheme. Amana's contentions that it is being punished for unproven or superfluous conduct is wholly without merit.

Turning from the evidence presented at trial to the *Gore* analysis, the Court notes that the Supreme Court has held that a state court award of punitive damages may be so "grossly excessive" as to violate the Fourteenth Amendment to the federal constitution. *See Gore,* 517 U.S. at 568, 116 S.Ct. 1589 ("Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's] interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."). The *Gore* analysis is equally applicable in the instant case, where the Plaintiff proceeded against the Defendants in federal court on state law claims on the basis of diversity of citizenship subject matter jurisdiction. *See Schimizzi v. Illinois Farmers Ins. Co.,* 928 F.Supp. 760, 785 (N.D.Ind.1996).

In *Gore* the Supreme Court held that in order for an award of punitive damages to pass constitutional muster, the award must meet the following elements: (1) the punitive damages award must relate to conduct occurring within the state; (2) a defendant must receive fair notice of the conduct that will subject him to punishment; and (3) a defendant must receive fair notice of the severity of the penalty that the state may impose. Regarding this third element, the Supreme Court has enunciated three "guideposts" for courts to consider: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and its punitive damages award; and (3) the differences between this remedy and the civil penalties authorized or imposed in comparable cases. *See Gore,* 517 U.S. at 574-75, 116 S.Ct. 1589. None of the three "guideposts" are [sic] outcome-determinative; rather, the Court is to consider them in turn upon the facts of a particular case.

Regarding the first element, the Court is satisfied that the punitive damages award relates to conduct that occurred primarily within Iowa. Here, the actions of Amana's agents in Iowa before the day of the execution of the contract,[9] on the day of the execution of the contract, and after the execution of the contract provide the bases for the Plaintiff's punitive damages award. The fraudulent scheme originated in Iowa, and any conduct by Amana's agent (Dr. Adam) outside of Iowa was clearly in furtherance of the Iowa-born scheme. It is not reasonable to assume that the jury's consideration of any out-of-state conduct was for purpose of multiplying the punitive damages award. Rather such evidence was considered as evidence of the very fraud alleged. *See State Farm,* 538 U.S. 408, 416-18, 123 S.Ct. 1513, 1519-21, 155 L.Ed.2d 585 ("Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded."). Thus, the "out-of-state" evidence presented at trial and considered on the punitive damages issue bore a direct relation to the harm suffered by the Plaintiff, and the Plaintiff's proof of the fraudulent scheme. The Supreme Court recently dealt with the contrasting case:

> The [state] courts awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.

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[9] Remember, the fraudulent scheme also involved the pre-contractual desire by Amana to recover on Dr. Adam's $2.4 million debt, as well as the pre-contractual decision that it really wanted Crystal as its exclusive distributor and would cancel the Plaintiff's contract once Amana recovered the $2.4 million from the Plaintiff.

> A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

State Farm, 538 U.S. 408, 422-23, 123 S.Ct. 1513, 1522, 155 L.Ed.2d 585. This was not the circumstance of the instant case; all proffered evidence bore a relation to, or a direct nexus to, the fraud alleged and the Plaintiff's harm.

Furthermore, it appears that Iowa would have, and has, an interest in seeing that all persons (whether citizens of Iowa or not) doing business with Iowa companies be dealt with honestly and in good faith. It would be anomalous to conclude that Iowa would tolerate, accept or give the green light to the defrauding of outsiders by Iowa companies.

Amana stresses that Dr. Adam approached the Plaintiff in Israel, and that exemplary damages are not recognized under Israeli law. *Citing Almog v. Israel Travel Advisory Service, Inc.,* 298 N.J.Super. 145, 689 A.2d 158 (1997).[10] The Court fails to see the significance of this, in light of the above conclusion that the fraudulent scheme originated in and was orchestrated from Iowa. In any

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[10] The Court finds of interest the following quotation from the *Almog* court: "Deterrence of egregiously wrongful conduct is also what punitive damages are all about. . . . Certainly the fact that [Israeli law] does not award punitive damages is not indicative of an interest in whether New Jersey law allows assessment of a punitive damages award against a New Jersey resident. The point, of course, is that its citizens are not being so assessed. By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction." *See Almog,* 689 A.2d at 164.

event, Amana has made no showing that fraudulent conduct is otherwise "legal" in Israel.[11] The Plaintiff notes:

> Defendant's argument regarding Israeli law is particularly troubling because it is reminiscent of the legal advice given by Leon Adam to Richard Montross. . . . Just as Adam encouraged Amana to terminate Eden Electrical because Eden could not seek punitive damages under Israeli law, Defendant's Motion suggests that Eden should not recover punitive damages in the present lawsuit because it could not recover such damages in its own country.

Furthermore, the Court strongly disagrees with Amana's following characterization of this case: "Iowa's interest in deterrence in this case is: to make sure Iowa companies do not 'apparently authorize' agents to misrepresent the company's intentions concerning the length of a potential distributorship agreement when communicating to third parties outside the state of Iowa." First, the jury could have determined Dr. Adam to be Amana's agent under one of three theories: (1) actual authority; (2) apparent authority; or (3) ratification. *See* Jury Instruction No. 10. There is no basis for Amana's conclusion that the jury considered Dr. Adam to be Amana's agent only under an apparent authority theory. Second, the fraudulent misrepresentation claim was not that Amana simply lied about the length of a potential distributorship, but that Amana orchestrated a scheme to require the Plaintiff to pay Dr. Adam's $2.4 million debt in order to obtain an

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[11] The Supreme Court has noted that a "state cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm*, 538 U.S. 408, 421, 123 S.Ct. 1513, 1522, 155 L.Ed.2d 585. As noted, the fraud here occurred primarily in Iowa.

exclusive distributorship agreement which Amana at no time intended to honor.

As regards the second *Gore* element, Amana contends that it did not have fair notice of the conduct that subjected it to punitive damages. The Court disagrees. As discussed *supra,* Amana's argument assumes incorrectly that the punitive damages award was based entirely on the conduct of Dr. Adam.[12] However, the jury was permitted to infer (and could reasonably have done so) that Mr. Montross authorized Dr. Adam to locate a distributor to buy Dr. Adam's inventory in return for Amana granting it an exclusive distributorship. The fact that the jury did not hold Mr. Montross individually liable does not mean that it did not believe him to be culpable. The jury perhaps concluded that only Amana, not Mr. Montross, benefitted from the fraud. The jury could have found that Dr. Adam lied about Mr. Montross's personal benefits, past and present, but believed his testimony concerning the fraud alleged to benefit Amana.

Furthermore, the circumstances of the Plaintiff's appointment as distributor did not involve low-level employees. Rather, the jury was permitted [to] consider the conduct of Amana's management hierarchy in determining whether Amana committed the alleged fraud against the Plaintiff. The knowledge of Messrs. Montross, Mason, Prusha and Boyle can appropriately be imputed to

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[12] The Court finds curious Amana's contention that it had no indication that Dr. Adam had "engaged in fraud" prior to May 1998. In February 1998 (prior to the date of the execution of the distributorship agreement) Amana filed suit against Dr. Adam's company, Williams International, accusing it of embarking upon a scheme to defraud Amana.

Amana because these individuals were at all times relevant to this lawsuit acting in a managerial capacity. *See Hampton v. Dillard Dept. Stores, Inc.,* 18 F.Supp.2d 1256, 1275 (D.Kan.1998); *Briner v. Hyslop,* 337 N.W.2d 858, 866-67 (Iowa 1983). The Supreme Court recognizes this principle, and has likewise stated: "Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive by those in a position to guard substantially against the evil to be prevented." *Haslip,* 499 U.S. at 14, 111 S.Ct. 1032 (internal quotation omitted).

In any event, it is clear that Amana ratified the fraudulent scheme of its authorized agents by initially accepting and thereafter retaining the $2.4 million paid by the Plaintiff. Even after the detailed circumstances of the fraud were brought to the attention of Amana and Goodman management by Mr. and Mrs. Eden, no action was taken to rectify the matter. It is entirely reasonable and appropriate to punish an employer for the ratification or approval of fraudulent acts of its agents.

The third element of *Gore,* determining whether a defendant received fair notice of the severity of the penalty that state law may impose, encompasses the commonly cited three guideposts a court is to consider. As noted, none of these guideposts are [sic] outcome-determinative; rather, the Court is to consider them upon the facts of the case. The Court will consider each of these three guideposts in turn.

The first, and most important, guidepost is the degree of reprehensibility of the conduct. *See Gore,* 517 U.S. at 575, 116 S.Ct. 1589. The Supreme Court has noted that a punitive damages award should reflect the enormity of its

offense, and that "some wrongs are more blameworthy than others." *See id.* The Supreme Court recently noted:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

See State Farm, 538 U.S. 408, 419, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585.

The instant case falls within the category of one causing economic harm, rather than a physical harm. Amana's conduct appears to be an isolated incident; the record does not reveal any other instances of fraudulent conduct against a distributor. Furthermore, the record also does not reveal that the Plaintiff should be considered as a financially vulnerable party. It was, and is, a large, successful enterprise.[13]

---

[13] The Court takes this opportunity to discuss the founder and architect of the highly successful Eden Electrical, Itzhak Eden. An Iraqi Jew, Mr. Eden and his family left Iraq when he was a small child for Israel. As a young adult in Israel, and with only a modest amount of education, he worked diligently to create his successful chain of Eden Electrical stores. The jury was very likely impressed with Mr. Eden's testimony; he came across as a man with much character and integrity, as well as a strong work ethic. Mr. Eden placed much confidence in the

(Continued on following page)

Nevertheless, the harm caused by Amana's conduct can be viewed as being the result of "intentional malice, trickery, or deceit." And, though the Plaintiff suffered only economic damages, Amana's conduct certainly falls at the more reprehensible end of the business fraud category. *See Gore,* 517 U.S. at 579-80, 116 S.Ct. 1589 ("[T]he omission of a material fact may be less reprehensible than a deliberate false statement."). As the Court noted in its January 24, 2003, Order: "[I]f one accepts the Plaintiff's evidence, one can hardly think of a more egregious intentional and malicious business fraud case." The Supreme Court has noted: "[I]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . can warrant a substantial penalty." *Gore,* 517 U.S. at 576, 116 S.Ct. 1589.

The second guidepost is the disparity between the harm and the punitive damages award, i.e., the ratio between the compensatory and punitive awards. *See id.* at 575, 116 S.Ct. 1589. The issue for the Court is whether the exemplary damages bear a reasonable relationship to the compensatory award. *See id.* at 580, 116 S.Ct. 1589. The Supreme Court recently discussed this second guidepost:

Amana representations, feeling he could trust the American company. It was evident that Mr. Eden was quite excited and proud of the prospect of both doing business with and associating his company name with a company from the United States. He even had the logo for his new operations display an American flag. He sought opportunities to meet with representatives of Amana to develop plans and strategies to make the distributorship successful but was rebuffed without explanation at every turn.

[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [*Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)], in upholding a punitive damages award, we concluded that an award more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore.* The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, 145 to 1.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, muse [sic] be based upon the facts and

> circumstances of the defendant's conduct and the harm to the plaintiff.

See State Farm, 538 U.S. 408, 424, 123 S.Ct. 1513, 1523-24, 155 L.Ed.2d 585 (internal quotations and citations omitted).

In the instant case, the parties stipulated that Amana's net worth at the time of its relevant conduct was approximately $325 million. The Court instructed the jury that "[i]n fixing the amount of punitive damages, you may consider all the evidence, including: . . . (2) The amount of punitive damages which will punish and discourage like conduct by Amana in view of its financial condition." *See* Jury Instruction No. 23. In *State Farm,* the Supreme Court addressed the issue of a defendant's wealth in relation to a punitive damages award. *See id.* at 1524-25. Contrary to various media accounts of the opinion, it may still be proper for the jury to consider the financial condition of a defendant. *See, e.g.,* Kathryn Kranhold, *Megadamages Against Industry May Be History,* Wall St. J., Apr. 9, 2003, at B1, B4 ("The Supreme Court ruling says a jury can't consider a defendant's wealth."). The Supreme Court actually held that the "wealth of a defendant cannot justify an *otherwise* unconstitutional punitive damages award." *See State Farm,* 538 U.S. 408, 427, 123 S.Ct. 1513, 1524-25, 155 L.Ed.2d 585 (emphasis added). Thus, the fact that a defendant is a wealthy corporation does not mean that a court is free to disregard the *Gore* analysis of determining of whether an award is violative of the Fourteenth Amendment. As explained *infra,* if punitive damages are to continue to serve the broader functions of deterrence and retribution, *see id.* at 1519-20, the defendant's wealth must be a consideration in calculating any award.

In the instant case, the ratio of punitive damages to compensatory damages is approximately 8.5 to 1. Furthermore, the Plaintiff has received a substantial compensatory damages award: $2.1 million.

The third guidepost is the differences between the punitive damages award and state civil and criminal penalties imposed in similar cases. *See Gore,* 517 U.S. at 575, 583-84, 116 S.Ct. 1589. If punished criminally, Amana's fraudulent conduct would have subjected it to a maximum term of imprisonment of ten years, and a maximum fine of $10,000. *See* Iowa Code Ann. §§ 714.8, 714.9, 902.9. These penalties reveal Iowa's public policy of treating fraudulent conduct seriously, and supports [sic] a finding of substantial punitive damages against Amana. However, these penalties shed little light on what amount of punitive damages are constitutionally permissible. As the Supreme Court noted: "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility." *See State Farm,* 538 U.S. 408, 428, 123 S.Ct. 1513, 1526, 155 L.Ed.2d 585.

In the instant case, the Court concludes that the jury's award of punitive damages in the amount of $17.875 million was rationally based upon the evidence presented, and is not so grossly excessive or based upon improper passion or prejudice as to be violative of Iowa law. The award does not shock the conscience of the Court. The Court further notes that the jury is to be commended for attentively sitting-through [sic] the three-week trial, a proceeding where much of the testimony was in the form of video-taped depositions or rendered through interpreters. It is evident to the Court that the jury was not

improperly inflamed or prejudiced in favor of the Plaintiff: the jury found against the Plaintiff on three of its four claims, and did not award the Plaintiff its requested compensatory damages.

Nonetheless, the award simply cannot withstand a federal constitutional inquiry under the excessiveness guidelines announced in *Gore* and further explained and refined in *State Farm*. After considering the *Gore* factors, and the three guideposts encompassing the third factor of fair notice of the potential sanction, the Court concludes that the award is constitutionally excessive under the Due Process Clause and therefore must be reduced as a matter of law.

As explained *supra,* the Court finds that the award satisfied the first two *Gore* elements: (1) it is based upon conduct that occurred primarily in Iowa, and the state has a legitimate state interest in deterring and punishing such behavior; and (2) Amana received fair notice of the conduct that subjected it to punishment. Furthermore, the third guidepost of the third *Gore* element, the differences between the punitive damages award and state civil and criminal penalties imposed in similar cases, demonstrates that Iowa considers fraudulent conduct within its borders to be a significant crime.

Rather, it is the application of the first two guideposts of the third *Gore* element, demonstrated by the Supreme Court in *Gore* and *State Farm,* that leads this Court to conclude that the Plaintiff's punitive damages award is constitutionally excessive and must be reduced in order to comport with Amana's due process guarantees. As regards the reprehensibility of Amana's conduct, the harm caused was economic and not physical. There was no reckless

disregard of the health or safety of the Plaintiff. Furthermore, the Plaintiff was not a financially vulnerable entity, but rather a sophisticated and highly-successful Israeli business. Amana's conduct appears to be an isolated incident; at least the record does not reveal any other instances of fraudulent conduct against a distributor. And it is unlikely that Amana and the Plaintiff will have any future business dealings.[14]

In favor of sustaining a substantial punitive damages award, the Court is mindful that though the Plaintiff suffered only economic harm, the Court can hardly think of a more reprehensible case of business fraud. Because of Amana's "intentional malice,[15] trickery, [and] deceit," this case certainly falls at the high end of reprehensibility in the economic harm category of punitive action claims. The Court finds the evidence of the fraudulent scheme, plus Amana's conduct in openly associating itself with Dr. Adam, an individual it knew to be of questionable character, as well as Amana's management's response once the scheme was brought to its attention, to be quite disturbing.

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[14] Furthermore, it does not appear that Amana will have any future dealings with Dr. Adam. The Amana division at issue in this lawsuit (Amana Appliances) is now under new ownership, having been purchased by the Maytag Corporation. Messrs. Montross, Prusha and Boyle are no longer employed by Amana.

[15] During oral argument Amana disputed any finding of intentional malice. The Court thinks otherwise. The jury found Amana's conduct in deliberately selecting and soliciting the Plaintiff in their scheme to recover the $2.4 million debt, not only "willful and wanton" but "directed specifically at the Plaintiff Eden Electrical." *See* Answers to Interrogatories Nos. 6 & 7, *supra*.

In *State Farm,* the Supreme Court spent much time discussing the ratio between compensatory damages and punitive damages without setting "any bright-line ratio which a punitive damages award cannot [constitutionally] exceed." *See State Farm,* 538 U.S. 408, 424-26, 123 S.Ct. 1513, 1523-24, 155 L.Ed.2d 585. Importantly, the Supreme Court suggested that where compensatory damages are significant, the Due Process Clause might require the punitive damages to be no more than equal to the compensatory damages. *See id.* But, clearly, depending on the facts of the case, the Due Process Clause will permit higher awards. Nevertheless, the Court accepts that, after *Gore* and *State Farm,* the award probably cannot exceed a 10-to-1 ratio. *See id.* Finally, with our jurisprudence's history of doubling, trebling and quadrupling damages to deter and punish, a 4-to-1 ratio "might be close to the line of constitutional impropriety." *See id.*

Specifically, this Court reads *State Farm* to mean that even where all the reprehensible considerations are present, but where compensatory damages are significant, the punitive damages award cannot ordinarily exceed the 10-to-1 ratio and still be constitutional. Thus, even where a plaintiff has suffered a physical harm as a result of a recidivist defendant's intentional and malicious disregard for the health and safety of others, and the defendant targeted his victim because the victim was financially vulnerable, still that plaintiff's punitive damages award could probably not constitutionally exceed the 10-to-1 ratio. When the Court compares the punitive damages award in the instant case (an economic harm case) to this hypothetical case, surely it must conclude that the Plaintiff's 8:5-to-1 ratio award is constitutionally excessive. A

lesser ratio must be established to make the award satisfy the Fourteenth Amendment.

So what is the constitutional limit on punitive damages in the instant case? In ascertaining this figure, the Court is mindful of its findings that though this is an economic harm case, it can hardly think of a more reprehensible case of business fraud. The Court concludes that if the punitive damages award is to have any punitive or deterrent effect – the stated rationale of such damages – then it is apparent that Amana's wealth and financial condition *must* be taken into consideration. This conclusion merits some discussion.

As noted above, the Supreme Court has consistently recognized that punitive damages serve the twin aims of punishment and deterrence. *See State Farm,* 538 U.S. 408, 416-18, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution."); *Gore,* 517 U.S. at 568, 116 S.Ct. 1589 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."). The Supreme Court of Iowa has also recognized that punitive damages are meant to punish and deter. *See McClure,* 613 N.W.2d at 230. If the punitive damages sanction is to continue to meet its twin aims, must not a court consider who is to be punished or deterred when ascertaining whether an award is constitutionally permissive? This question answers itself because an award that would effectively punish and deter General Motors or Bill Gates would have to be many, many, many times greater than an award which would adequately punish and deter, say, the local one-store druggist. Otherwise, the potential punitive damages sanction might risk becoming merely

an insignificant additional cost of doing business to some wealthy entities.

The Finns have recognized this principle: in Finland, to ensure appropriate deterrence and retribution, speeding ticket fines are based upon the violator's income. *See* Steve Stecklow, *Finnish Drivers Don't Mind Sliding Scale, But Instant Calculation Gets Low Marks,* Wall St. J., Jan. 2, 2001, *available at* www.stayfreemagazine.org/public/wsj_finland.html ("In Finland, traffic fines generally are based on two factors: the severity of the offense and the driver's income. The concept has been embedded in Finnish law for decades: When it comes to crime, the wealthy should suffer as much as the poor. Indeed, sliding-scale financial penalties are also imposed for offenses ranging from shoplifting to securities-law violations.").[16] Furthermore, in pre-*Gore* cases the Supreme Court noted that while the wealth of the wrongdoer must not be unduly emphasized, a jury may consider the defendant's wealth in determining punitive damages. *See TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 463-64, 113 S.Ct. 2711, 125

[16] Sheriff Andy Taylor of fictional Mayberry, North Carolina, also recognized that if a fine is to effectively punish and deter an individual, the individual's financial status must be considered. In his role as justice of the peace, Sheriff Taylor explained why he fined Mr. Williams, a wealthy New York entertainer, $100 for a traffic violation when the fine ordinarily was $5: "I will admit that the fine for what he done is usually no more than five dollars. But, [for] most folks in these parts, five dollars puts a pretty good-sized crimp in their pocket books, don't you see. But now . . . a little old five or ten dollar bill couldn't have meant less to Mr. Williams. So I just had to heavy up the price so he'd feel the weight of the law a little bit. . . . " *See Make Room for Daddy: The Danny Thomas Show* (CBS television broadcast Feb. 15, 1960) (episode "Danny Meets Andy Griffith," the pilot episode of *The Andy Griffith Show*).

L.Ed.2d 366 (1993); *Haslip,* 499 U.S. at 21-22, 111 S.Ct. 1032.

The Court concludes that it must throw into the balance and otherwise take into account Amana's net worth when considering the maximum punitive damages amount the Due Process Clause will permit. Amana is a moderately wealthy business enterprise, having a relevant net worth of $325 million.

After considering all of the above, the Court concludes that the Due Process Clause permits a maximum punitive damages award against Amana in the amount of $10 million, an amount which is 4.76 times the compensatory damages award, and approximately 3% of Amana's net worth.

Because the Court is reducing the verdict as a matter of constitutional law, it need not issue a remittitur or otherwise obtain the Plaintiff's consent. *Compare Ross,* 293 F.3d at 1049-50 *and Thorne v. Welk Investment, Inc.,* 197 F.3d 1205, 1212 (8th Cir.1999). Amana's motion is made pursuant to Federal Rule of Civil Procedure 59(e). Rule 59(e) provides authority for the Court to alter or amend a judgment. Of course, had the Court determined the punitive damages award to be excessive under Iowa state law or based upon prejudice, the Court would have had to treat Amana's motion as a Rule 59(a) request for a new trial, and offer the Plaintiff a remittitur before altering the award. But where this Court concludes that a punitive damages award is constitutionally excessive, it may amend the judgment as a matter of law. The *Ross* court has explained:

> A constitutionally reduced verdict . . . is really not a remittitur at all. A remittitur is a substitution of the

> court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court . . . a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Ross, 293 F.3d at 1049 (quoting *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir.1999)).

III. Conclusion

IT IS THEREFORE ORDERED that the Separate Defendant Amana's Motion to Alter or Amend Punitive Damages Judgment (Doc. # 237) be, and it is hereby, GRANTED in part and DENIED in part. The jury's punitive damages award is hereby reduced from $17.875 million to $10 million.

IT IS FURTHER ORDERED that the Separate Defendant Amana's request for an oral argument on its Motion to Alter or Amend Punitive Damages Judgment (Doc. # 248) be, and it is hereby, DENIED as moot.[17]

AMENDED JUDGMENT

The Court hereby orders that the District Court Clerk enter this Amended Judgment. This Amended Judgment

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[17] The District Court Clerk may remove Docs. # 234 and 236 from the pending motions list. The Court ruled on these two motions in its March 28, 2003, order (Doc. # 258).

supercedes the original Judgment in a Civil Case entered February 3, 2003 (Doc. # 229).

The above styled case came on for trial before the Court and a jury in January 2003, and the issues having been duly tried and the jury having rendered its verdict, judgment is hereby entered in favor of the Plaintiff Eden Electrical, Ltd. and against the Defendant Amana Company, L.P. in the sum of Two Million One Hundred Thousand ($2,100,000.00) Dollars in compensatory damages and Ten Million ($10,000,000.00) Dollars in punitive damages in accordance with the Court's memorandum opinion and order of even date herewith. Interest will accrue as provided by law from the date of the original judgment, February 3, 2003.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2123/2188

Eden Electrical, Ltd.,	:	
Appellee/Cross-Appellant,	:	Order Denying Petition
v.	:	for Rehearing and for
	:	Rehearing En Banc
Amana Company, etc.,	:	
	:	
Appellant/Cross-Appellee.	:	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris Sheppard Arnold and Judge Gruender would grant the petition for rehearing en banc.

Judge Melloy and Judge Colloton did not participate in the consideration or decision of this matter.

(5128-010199)

September 9, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JAN 6 - 2005
OFFICE OF THE CLERK

No. 04-802

IN THE

Supreme Court of the United States

AMANA COMPANY d/b/a AMANA APPLIANCES, INC.,

Petitioner,

v.

EDEN ELECTRICAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should grant certiorari to review the Eighth Circuit's factbound determination of an appropriate punitive award against Amana Company for its fraud, which resulted in a 4.8 to 1 ratio between punitive and compensatory damages and which is otherwise entirely consistent with this Court's precedents, including its recent decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

RULE 29.6 STATEMENT

The parent corporation of Respondent Eden Electrical, Ltd. is Eden Electrical Appliances. There is no publicly held company that owns ten percent or more of the stock of Eden Electrical, Ltd.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Constitutional Provisions Involved	1
Statement of the Case	1
Reasons for Denying the Petition	10
I. Certiorari should not be granted to adopt Amana's proposed rules that conflict with fundamental principles of this Court's jurisprudence.	12
A. Amana's proposed rules seek to reduce due process to a "bright-line," which this Court has repeatedly refused to do.	12
B. Amana's first proposed rule would improperly shift the focus of due process review away from factually-specific issues such as reprehensibility to the formalistic issue of whether a reviewing court made express findings regarding all punitive damages factors.	15

Contents

Page

C. Under Amana's second proposed rule, the constitutionality of a punitive award would improperly depend on the highest amount of punitive damages affirmed by a state court in another case. 17

II. The Eighth Circuit's factbound determination of a punitive award is entirely consistent with this Court's punitive damage jurisprudence and does not warrant the granting of certiorari. 19

III. The various "approaches" to punitive damages described by Amana would not constitute a basis for certiorari even if they accurately characterized circuit court decisions since *State Farm v. Campbell*, which they do not. 22

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) .. 14

Arizona v. Evans, 514 U.S. 1 (1995) 18

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 10, 13, 15, 19

Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182 (1999) 13

Conseco Fin. Servicing Corp. v. North Am. Mortgage Co., 381 F.3d 811 (8th Cir. 2004) 9, 21

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 12

Demore v. Kim, 538 U.S. 510 (2003) 16

In re the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004) 14, 15

Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000) 10

Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004) 22

Harris v. United States, 536 U.S. 545 (2002) 14

Cited Authorities

	Page
Illinois v. Wardlow, 528 U.S. 119 (2000)	14
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Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782 (8th Cir. 1999)	10
KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 125 S. Ct. 542 (2004)	22
Lambrix v. Singletary, 520 U.S. 518 (1997)	14
Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992)	9
Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003)	22
Ohio v. Robinette, 519 U.S. 33 (1996)	13
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	8, 13, 20
Racing Ass'n of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004)	18
Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366 (Fed. Cir. 2003)	23

Cited Authorities

Page

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir.1993) 9

Ross v. Kansas City Power & Light Co., 293 F.3d 1041 (8th Cir. 2002) 10

Southern Union Co. v. Southwest Gas Corp., 281 F. Supp. 2d 1090 (D. Ariz. 2003) 15

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 13

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) ..... *passim*

Constitutional Provisions:

U.S. Const., Art. VI, cl. 2 ..... 1, 9

U.S. Const. amend. XIV, § 1 ..... 1, 14

Statutes:

Iowa Code § 714.8 20

Iowa Code § 714.9 20

Iowa Code § 902.9 20

Cited Authorities

Page

Rules:

Supreme Court Rule 10 ..... 11, 12, 19, 21, 22

Federal Rule of Appellate Procedure 35 21

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." U.S. Const., Art. VI, cl. 2.

STATEMENT OF THE CASE

This case involves conduct so extreme as to lead the trial judge to conclude that he could hardly imagine a more egregious business fraud. Pet. App. 34. The jury determined that Eden Electrical was entitled to compensatory damages of $2.1 million and that Amana Company's fraud warranted punitive damages of $17.875 million. The trial judge reduced the punitive award significantly, from $17.875 million to $10 million. The United States Court of Appeals for the Eighth Circuit unanimously affirmed, in a factbound application of this Court's precedents. The Eighth Circuit denied Amana Company's request for rehearing en banc.

1. Amana's fraudulent scheme.

As the Eighth Circuit and the trial court both determined, Amana Company ("Amana") engaged in an elaborate scheme to defraud Eden Electrical.[1] Pet. App. 8 (determining that

1. There is simply no merit to Amana's argument (Pet. i, 15) that its fraud liability is premised entirely on one oral representation.

Amana engaged in an "extraordinarily reprehensible scheme to defraud"); Pet. App. 15-24, 34 (discussing Amana's fraudulent scheme).

During the 1990s, Leon Adam was the distributor for Amana in Israel. Adam began to accumulate substantial debt for inventory purchased from Amana. That inventory, which was stored in a New Jersey warehouse, was outdated and referred to as "junk" by Amana employees. In the late 1990s, Amana's Vice President of International Sales (Richard Montross) felt tremendous pressure to collect Adam's debt. Amana was particularly concerned because Adam's debt exceeded the credit limit established by Amana's insurer of foreign accounts. When Amana was sold by its corporate parent, its need to recover Adam's debt increased even more. Amana eventually stopped shipping product to Adam because of his high debt, putting itself out of business in Israel. By early 1998, Adam's debt had reached $2.4 million, the largest international debt in Amana's history. An Israeli court-appointed receiver then took over Adam's company and put it into bankruptcy. As a result, Adam had no way to repay his debt to Amana.

Because of Amana's desperate need to collect the $2.4 million debt and Adam's inability to pay, Amana Vice President Montross and Leon Adam devised a fraudulent scheme. Montross instructed Adam to find a "sucker" who would pay $2.4 million for the "junk" New Jersey inventory in exchange for appointment as Amana's exclusive Israeli distributor. After the "sucker" paid the $2.4 million, Amana would fabricate a dispute and terminate the distributorship.

Pursuant to Montross' instructions, Leon Adam set out to find an Israeli company that could pay $2.4 million.

He chose Eden Electrical ("Eden"), a prominent Israeli electronics business founded by Itzhak Eden. In early February 1998, Adam offered Eden what Adam described as the "number one opportunity of a lifetime." Eden was told that if it paid $2.4 million for some Amana inventory, it would be granted Amana's Israeli distributorship.

Itzhak Eden was quite flattered to be offered the Amana distributorship. However, he was willing to pay $2.4 million to become Amana's distributor only if certain conditions were met: (a) the distributorship had to be exclusive; (b) the distributorship had to be long-term; and (c) the relationship between Amana and Eden had to be direct. Acting on behalf of Amana, Leon Adam agreed to Eden's conditions.

On February 16, 1998, Eden representatives traveled to Amana, Iowa to meet with Amana officers and Leon Adam. The Amana officers confirmed in writing that Eden's distributorship would be exclusive and that the business relationship between the companies would be direct.[2] Eden paid the $2.4 million to Amana and signed the distributorship agreement.

Once Eden had signed the agreement, an Amana officer took it out of the room and made a handwritten change to the termination provision, reducing the notice period to thirty days. When the Amana officer brought the agreement back into the room, the Eden representatives noticed the handwritten change and demanded an explanation. The Amana officers lied, stating that the change was made

2. The letter promising a direct business relationship was drafted by Leon Adam and signed by Amana's International Credit Manager (Leonard Mason). According to the International Credit Manager, he "didn't intend anything" by signing the letter.

pursuant to a company-wide policy.[3] The Amana officers also promised Eden that its distributorship would be long-term and that Amana would act in "good faith."

The very same day that Amana executed its agreement with Eden, Amana's General Counsel (Matthew Clark) sent a letter to the Israeli court-appointed receiver regarding the status of the Israeli distributorship. The letter (drafted by Leon Adam) stated that Amana was "actively searching" for a new Israeli distributor.

The agreement signed by Amana and Eden on February 16, 1998, expressly provided that Eden's distributorship was exclusive. Unbeknownst to Eden, that same day, Amana signed an agreement with Leon Adam allowing him to sell "reworked" Amana refrigerators in Israel. Eden was also unaware that Amana had previously promised to sell 5,100 Amana-manufactured refrigerators to another Israeli business (Crystal Consumer Products) during Eden's "exclusive" term.

Oblivious that Amana had chosen his company to defraud, Itzhak Eden believed that the Amana distributorship would be the "crown jewel" of his business. Eden hired additional employees, established retail outlets for Amana products, and ordered thousands of red-white-and blue warranty certificates bearing Amana's name. Eden sent a letter to Amana explaining his business activities and requesting an invitation to Amana's factory. Amana did not

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3. As the trial court concluded, there was no company-wide policy requiring the handwritten change. Pet. App. 22 n.5. Significantly, the distributorship agreement signed by Eden's successor did not contain the 30-day notice provision added by Amana to Eden's agreement.

respond. Eden telephoned Amana and attempted to order additional inventory. Amana refused.

Amana then moved forward with its plan to fabricate a dispute with Eden. Itzhak Eden received two letters from Amana Vice President Montross stating that Eden was required to use another company (owned by Adam's business associate) as an exporter. In response, Eden sent a letter to Amana explaining that the requirement of an exporter seemed "very strange" in light of Amana's written promise of a direct relationship. Amana did not reply.

Meanwhile, Montross and Adam finalized the details for terminating Eden's distributorship, which Adam described as the "kill." In a letter to Montross, Adam outlined a "strategy" for termination and discussed Eden's legal remedies upon termination, including whether Eden could sue Amana in Israel. On May 4, 1998, Adam sent Montross a draft termination letter for Eden. Adam's handwritten note to Amana states: "Dear Friends: Let's f*** those bastards." Later that day, Montross sent Eden a two-sentence termination letter that was virtually identical to Adam's draft.

Eden had been Amana's distributor for only seventy-seven days when it received the termination letter. Eden had not even received the inventory that it had purchased from Amana for $2.4 million.

Eden contacted Amana and Amana's corporate parent on several occasions asking for a meeting and requesting the return of its $2.4 million payment. Eden was told that Amana had nothing to say.

The termination of Eden's distributorship took effect on June 3, 1998. Amana appointed Crystal Consumer Products as its Israeli distributor nine days later.

Eden's business collapsed because of the termination of its Amana distributorship.[4] Eden eventually took possession of the inventory purchased from Amana but not before incurring $200,000 in fines and demurrage.[5] Eden ultimately sold that inventory at a loss of $1.247 million.

2. **The trial.** Eden filed suit against Amana in the Northern District of Iowa. The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, presided by designation at trial.

Amana could not and did not deny that Eden had been defrauded. In fact, Amana Vice President Montross *admitted* during trial that Eden was a victim of fraud. Instead, Amana argued that Eden had been defrauded by Leon Adam rather than by Amana. This defense conflicted with the plethora of evidence that Adam was Amana's agent, including Adam's testimony regarding the fraudulent scheme devised by Montross and himself, Adam's advice to Amana regarding Eden's termination, and Adam's drafting of letters signed by Amana officers. *See generally* Pet. App. 30.

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4. Contrary to Amana's assertion (Pet. 2 n.1), Eden is not currently in negotiations to sell its stores. Eden was forced to sell its stores years ago because of Amana's fraud.

5. Eden incurred the fines and demurrage because Amana refused to provide Eden with documentation that the inventory had been manufactured in the United States.

The trial court submitted fraudulent misrepresentation and fraudulent concealment claims to the jury. The fraudulent misrepresentation instruction required proof of a representation "that Amana was in good faith seeking Eden Electrical to become its exclusive distributor in Israel."[6] The twelve jurors unanimously determined that Amana had committed fraudulent misrepresentation. The fraudulent concealment instruction required proof that Amana owed a duty of disclosure to Eden and that Amana knew before appointing Eden that it would appoint Crystal Consumer Products as Eden's successor. Amana strongly contested both of those issues at trial. The jury found that Eden had not proven fraudulent concealment by clear and convincing evidence.

The trial court limited Eden's compensatory damages to two years' lost profits, despite the fact that Amana's two prior distributors had collectively served for two decades. The jury awarded $2.1 million in lost profits, $500,000 *less* than requested by Eden's counsel during closing argument.

The punitive damages instruction explained that the jury could award punitive damages only if Eden had proven by clear and convincing evidence that Amana's conduct was willful and wanton. The trial court instructed the jury, *without* objection by Amana, that it could consider Amana's financial condition when fixing the amount of punitive damages. Amana stipulated that its net worth was $325 million. The twelve jurors unanimously imposed punitive damages in the amount of $17.875 million.

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6. Contrary to Amana's argument, the oral promise of good faith by Amana's Territory Manager was not its only representation of good faith. Under Iowa law, representations are made through conduct as well as words, as the jury was instructed *without* objection by Amana. Amana represented good faith when it took Eden's $2.4 million and entered into a distributorship agreement with Eden.

3. **The trial court's reduction of the punitive award.** Amana filed a post-trial motion seeking reduction of the punitive award. According to the trial court, it was "evident" that the jury had not been inflamed or prejudiced. Pet. App. 37-38. The court determined, however, that the jury's punitive award was constitutionally excessive and should be reduced from $17.875 million to $10 million. Pet. App. 43.

The trial court's decision was based on a factbound application of this Court's punitive damages jurisprudence, including *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW v. Gore*, 517 U.S. 559 (1996). Significantly, the trial judge of thirty-five years observed: "If one accepts the Plaintiff's evidence, one can hardly think of a more egregious intentional and malicious business fraud case." Pet. App. 34.

One of the many factors considered by the trial court was Amana's $325 million net worth. While Amana implies that the trial court's only authority for such consideration was Finnish law (Pet. 8-9), the trial court actually relied on this Court's decisions in *TXO v. Alliance*, 509 U.S. 443 (1993) and *Pacific Mutual v. Haslip*, 499 U.S. 1 (1991). Pet. App. 42-3.

4. **The Eighth Circuit's decision.** Amana appealed to the Eighth Circuit, alleging that the fraud and agency instructions were improper and that the reduced punitive award was excessive. Eden cross-appealed, asserting that the trial court had erred in reducing the jury's punitive award to $10 million. The Eighth Circuit affirmed on all grounds. Pet. App. 2.

The Eighth Circuit applied this Court's punitive damages jurisprudence, including *State Farm Mutual Automobile*

Insurance Company v. Campbell, 538 U.S. 408 (2003). Its decision sets forth all three *Gore* guideposts and contains a detailed discussion of the facts surrounding Amana's fraud. Noting that reprehensibility is the most important guidepost, the Eighth Circuit determined that Amana engaged in an "extraordinarily reprehensible scheme to defraud" (Pet. App. 8) and that Amana's conduct was "purposefully designed to maliciously victimize another company. . . ." (Pet. App. 7). The Eighth Circuit agreed with the trial court that a punitive award of $10 million against Amana meets the requirements of due process. Pet. App. 6.

Amana chooses to characterize the Eighth Circuit's award against it as the largest award that the court "has ever upheld to a single entity." Pet. 2. *Contra TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-4 (1993) (explaining that "meaningful comparisons" of punitive awards are "difficult to make"). Through its careful wording, Amana has avoided mentioning other multi-million dollar punitive awards imposed by the Eighth Circuit, including a $10 million punitive award in a case involving ten plaintiffs. *Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1501 (8th Cir. 1992) (affirming ten $1 million punitive awards in fraud case involving ten plaintiffs). *See also Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (in unfair competition case that did not involve "extremely reprehensible conduct," reducing $18 million punitive award to $7 million); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 385 (8th Cir. 1993) (affirming $4 million punitive award for fraud and $4 million punitive award for tortious interference). Amana also ignores Eighth Circuit cases involving ratios significantly higher than the 4.8 to 1 ratio

imposed against it. *E.g.*, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir. 2002) (imposing 10:1 ratio in employment discrimination action); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (affirming 27:1 collective ratio in fraud action); *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (affirming 10:1 ratio in sexual harassment action).

5. **The Eighth Circuit's denial of en banc review.** Amana requested en banc review of the punitive award against it. The Eighth Circuit denied Amana's request.

REASONS FOR DENYING THE PETITION

Amana's Petition sets forth three arguments, none of which articulate a basis for certiorari.

In its first argument, Amana asks this Court to adopt two bright-line rules for determining whether a punitive award complies with due process.[7] This Court has repeatedly refused to reduce due process to a "bright-line," including in its recent *State Farm* decision. *E.g. State Farm v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Amana has offered no justification for abandoning this Court's precedents. Amana's accusation that

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7. Amana's first proposed rule would provide that when a punitive award is at least $100,000, the award would be deemed "presumptively unconstitutional" if the reviewing court did not make "specific findings regarding each of the *Gore / State Farm* guideposts (including the subparts of the reprehensibility guidepost)." Pet. 13-14. Amana's second proposed rule would provide that "the highest previous punitive damage award affirmed by the highest court of a state" would set "the presumptive ceiling for any federal award under that state's law." Pet. 14.

lower courts are awarding punitive damages based solely on "gut reactions" is completely unfounded, as Amana's own authority reveals. Furthermore, the rules proposed by Amana are themselves contrary to fundamental principles of this Court's jurisprudence. Under Amana's first proposed rule, the constitutionality of a punitive award would depend not on reprehensibility, ratios, and comparable penalties (as required by *State Farm*) but rather on whether the reviewing court made specific findings regarding all punitive damages factors, regardless of whether the factors have any possible relevance to the particular case. This Court has already rejected such a formalistic approach to due process review. *See TXO*, 509 U.S. at 464-5. In addition, Amana's first rule would arbitrarily apply only to punitive awards of at least $100,000. Under Amana's second proposed rule, a punitive award would not be based on the particular facts of the case, as this Court has consistently required. *See State Farm*, 538 U.S. at 425. Instead, under Amana's rule, the constitutionality of a punitive award would depend on the highest punitive award affirmed by a state court in some other case.

Amana's second argument is that the Eighth Circuit erred in its factbound application of this Court's punitive damages jurisprudence. The Eighth Circuit's decision is not erroneous. Even if it were, Amana's criticisms of the Eighth Circuit's decision would not justify the granting of certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

As its third argument, Amana labels circuit court decisions in terms of various "approaches" toward punitive

damages. Amana does not identify an intercircuit conflict or otherwise articulate a basis for certiorari. *See* Sup. Ct. R. 10. Moreover, Amana's labels mischaracterize the courts' decisions, which are based on this Court's punitive damages jurisprudence.

I. Certiorari should not be granted to adopt Amana's proposed rules that conflict with fundamental principles of this Court's jurisprudence.

A. Amana's proposed rules seek to reduce due process to a "bright-line," which this Court has repeatedly refused to do.

Amana asks this Court to grant certiorari to adopt two bright-line rules for determining whether a punitive award complies with due process. Under Amana's first rule, the constitutionality of a punitive award would depend on the number of punitive damages factors discussed in the reviewing court's decision. Pet. 13-14. Under Amana's second rule, the constitutionality of a punitive award would depend on the highest punitive award previously affirmed by a state court in some other case. Pet. 14.

A majority of this Court has held that the amount of a punitive award is subject to review under due process. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-4 (1993). However, it recognizes that the determination of whether a punitive award satisfies due process is "inherently imprecise." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001). Accordingly, this Court has consistently refused to reduce

due process to a "bright-line." *E.g.*, *TXO*, 509 U.S. at 458 (1993) (affirming the rejection of a "mathematical bright line"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case"). *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) ("It is appropriate, therefore, to reiterate our rejection of a categorical approach"). As recently as its 2003 *State Farm* decision, this Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425.

This Court's refusal to adopt a "bright-line" due process test for punitive damages is entirely consistent with its constitutional jurisprudence. In the context of free speech,[8] right to counsel,[9] takings,[10] and unreasonable searches and seizures,[11]

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8. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made") (citations omitted).

9. *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 1388 (2004) (explaining that compliance with the Sixth Amendment cannot be resolved by a "formula or script" but rather "will depend on a range of case-specific factors").

10. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002) ("Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine a number of factors rather than a simple mathematically precise formula").

11. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("[T]he touchstone of the Fourth Amendment is reasonableness," which requires a "fact-specific" inquiry rather than "bright-line rules").

this Court has determined that constitutional doctrines cannot be reduced to a "neat set of legal rules." *Illinois v. Wardlow*, 528 U.S. 119, 126-7 (2000) (Stevens, J., concurring in part and dissenting in part) (explaining that the concept of reasonable suspicion under the Fourth Amendment cannot be "reduced to a neat set of legal rules" but rather "must be determined by looking to the totality of the circumstances — the whole picture") (citations omitted).

Adopting Amana's proposed bright-line rules would require nothing less than an abandonment of this Court's punitive damages jurisprudence, including its 2003 *State Farm* decision. Such action would be warranted only for "special justification," which is wholly absent here. *See Harris v. United States*, 536 U.S. 545, 557 (2002) ("Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a special justification") (citations omitted). Amana contends that its bright-line rules are necessary because judges are "ignoring" due process jurisprudence and awarding punitive damages based "simply on [their] gut reactions to the defendants' conduct." Pet. 12. By making this bold accusation, Amana asks this Court to reject the precept that "there is *always* a reason to believe" that judges "know the law" and "apply it in making their decisions." *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997). *See Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 820 (1986) ("As [B]lackstone put it, the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea") (citation omitted). Furthermore, Amana offers no authority demonstrating the hypothesized "gut reaction" decisions regarding punitive damages. The *Exxon Valdez* decision cited by Amana sets

forth a detailed factual analysis, a discussion of the history of punitive damages jurisprudence, and an exhaustive application of the three *Gore* guideposts. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1076-8, 1085-1109 (D. Alaska 2004). The *Southern Union* decision cited by Amana is also based on an application of the three *Gore* guideposts. *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003).[12] Similarly, there is no reason to suspect that the Eighth Circuit's award of punitive damages against Amana was a lawless "gut reaction," as Amana suggests. The Eighth Circuit's decision articulates the three *Gore* guideposts, analyzes the specific facts surrounding Amana's fraud, and reaches a decision entirely consistent with this Court's precedents, as discussed further below. Pet. App. 1-9.

B. Amana's first proposed rule would improperly shift the focus of due process review away from factually-specific issues such as reprehensibility to the formalistic issue of whether a reviewing court made express findings regarding all punitive damages factors.

Under Amana's first proposed rule, when a punitive award is "six figures or above," the award would be deemed "presumptively unconstitutional" if the reviewing court did not make "specific findings regarding each of the *Gore / State Farm* guideposts (including the subparts of the reprehensibility guidepost)." Pet. 13-14.

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12. The fact that *Southern Union* imposed a ratio of 153 to 1 does not mean that it was ignoring the law, as Amana suggests. Rather, the court determined that under *State Farm*, *Gore*, and *TXO*, it should consider not only the plaintiff's compensatory damages but also "potential" damages when evaluating the ratio. *Id.* at 1104-5.

In its recent *State Farm* decision, this Court confirmed that due process review of a punitive award must focus on the factually-specific issues of reprehensibility, ratios, and comparable penalties. *State Farm*, 538 U.S. at 418. Amana's proposed rule would shift the focus instead to the formalistic issue of whether a reviewing court made express findings regarding all punitive damages factors, some of which may have no possible relevance to the particular case. This Court has already rejected such a formalistic approach to due process review, by holding that it was "certainly not prepared" to deem a punitive award unconstitutional simply because the trial judge did not "articulate his reasons" for the award. *TXO*, 509 U.S. at 464-5.

Moreover, for reasons that Amana does not explain, its first proposed rule would apply only if the punitive award were at least $100,000. The due process clause, which is aimed at preventing arbitrary government action, should not be enforced through such an arbitrary rule. *See State Farm*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"); *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (explaining that the Due Process Clause "prohibits arbitrary deprivations of liberty").

C. Under Amana's second proposed rule, the constitutionality of a punitive award would improperly depend on the highest amount of punitive damages affirmed by a state court in another case.

Under Amana's second proposed rule, "the highest previous punitive damage award affirmed by the highest court of a state" would set "the presumptive ceiling for any federal award under that state's law." Pet. 14.

As an initial matter, Amana's rule falsely assumes that the highest punitive award affirmed to date constitutes a determination of the maximum permissible punitive award. In fact, the highest award affirmed by a state court is a function of the punitive awards it has been asked to review. If, for instance, a court is asked by a defendant to review a jury's punitive award of $1 million, the court cannot increase that award even if it determines that a greater award would be constitutional.

In addition, implementing Amana's second rule would violate this Court's mandate that a punitive award "*must* be based upon the facts and circumstances of *the defendant's* conduct and the harm to *the plaintiff*." *State Farm*, 538 U.S. at 425 (emphasis added). This Court has already rejected the notion that punitive damages in one case should be used as a "test" for punitive damages in another case:

> It is a relatively straightforward task to draw intra-jurisdictional and interjurisdictional comparisons on such matters as the definition of first-degree murder (*Schad*) or the penalty imposed on nonviolent repeat offenders (*Solem*). The same cannot be said of the

> task of drawing such comparisons with regard to punitive damages awards by juries. Such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. *Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.* . . . Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, *we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.*

TXO, 509 U.S. at 457-8 (citations omitted) (emphasis added).

The application of Amana's second rule would, in certain circumstances, also violate the Supremacy Clause of the Federal Constitution. A state court may be asked to review a punitive award based not on federal constitutional law but rather solely on *state* constitutional law. *See generally Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"); *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (holding that Iowa's disparate tax rates for racetracks and riverboats violate the Iowa constitution notwithstanding this Court's determination that the rates satisfied the Federal Constitution). Under Amana's proposed rule, the punitive award based entirely on state law would improperly dictate

federal constitutional law. *Contra* U.S. Const., Art. VI, cl. 2 (providing that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

II. The Eighth Circuit's factbound determination of a punitive award is entirely consistent with this Court's punitive damage jurisprudence and does not warrant the granting of certiorari.

As its second argument, Amana alleges that the Eighth Circuit erred in applying the three *Gore* guideposts. Even if the Eighth Circuit had erred, the granting of certiorari would not be warranted. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). However, the Eighth Circuit did not err. The Eighth Circuit's decision is entirely consistent with this Court's punitive damages jurisprudence.

The Eighth Circuit's decision focuses, appropriately, on what this Court has identified as the most important guidepost. *See State Farm*, 538 U.S. at 419. The decision articulates the specific reprehensibility factors identified in *State Farm* and contains an in-depth analysis of Amana's fraudulent scheme. Pet. App. 3-8. Contrary to Amana's suggestion, the Eighth Circuit judges did not shun their constitutional roles and assume the roles of "super-jurors" by engaging in this analysis. Pet. 15, 18. Rather, the judges were following this Court's mandate to analyze reprehensibility based on the particular facts of the case. *See State Farm*, 538 U.S. at 425. Based on their review of the evidence, the Eighth Circuit judges unanimously determined that Amana had engaged in "an extraordinarily

reprehensible scheme to defraud." Pet. App. 8. In so holding, the Eighth Circuit adopted Trial Judge Eisele's conclusion that he could "hardly think of a more egregious intentional and malicious business fraud case." Pet. App. 6, 34.

The Eighth Circuit also considered the second guidepost, the ratio between punitive damages and compensatory damages. Pet. App. 7-8. The ratio imposed by the Eighth Circuit against Amana is less than 5 to 1. That ratio is, therefore, entirely consistent with *State Farm*, which explains that "*single-digit multipliers* are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." *State Farm*, 538 U.S. at 425 (citations omitted) (emphasis added).

The Eighth Circuit's decision also mentions the third *Gore* guidepost. Pet. App. 5-6. As the trial court discussed in its decision, a criminal defendant who commits fraud in Iowa faces not only a substantial fine but also ten years of imprisonment. Iowa Code §§ 714.8, 714.9, 902.9.[13] Iowa's serious criminal penalties for fraud reflect a strong public policy that supports a substantial punitive award. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (in affirming punitive damages that were four times the compensatory damages and more than 200 times the plaintiff's out-of-pocket expenses, noting that imprisonment was a possible criminal penalty for fraud).

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13. While Amana suggests to this Court that the criminal statutes cited in the trial court's decision do not have "anything to do with this case" (Pet. 7 n.5), Amana cited those same provisions to the trial court in its post-trial motion.

In support of its argument that the Eighth Circuit erred in imposing punitive damages against it, Amana points to the punitive awards in three *subsequent* Eighth Circuit decisions. Pet. 18-20. Amana made this precise argument to the Eighth Circuit in support of its Petition for Rehearing En Banc, which the court denied. If there truly were a conflict among Eighth Circuit decisions, the appropriate mechanism for resolution of the conflict would have been en banc consideration by the Eighth Circuit, not the granting of certiorari by this Court. Fed. R. App. P. 35(a). *Cf.* Sup. Ct. R. 10. Moreover, the differing punitive awards do not reflect an intercircuit conflict. Instead, they indicate that the Eighth Circuit is consistently following this Court's mandate to base every punitive award on the particular "facts and circumstances" of the case. *See State Farm*, 538 U.S. at 425. The subsequent cases cited by Amana, which involve wrongful death, race discrimination, and unfair competition, are factually distinguishable from Amana's fraud against Eden. The cases also involve varying degrees of reprehensibility, which this Court has identified as the most significant factor in a punitive damages analysis. *State Farm*, 538 U.S. at 419. For instance, while Amana was found to have engaged in an "extraordinarily reprehensible scheme to defraud" (Pet. App. 8), the defendant in *Conseco* was deemed to have engaged in behavior that was not "extremely reprehensible." *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825-6 (8th Cir. 2004) (imposing $7 million punitive award).

III. The various "approaches" to punitive damages described by Amana would not constitute a basis for certiorari even if they accurately characterized circuit court decisions since *State Farm v. Campbell*, which they do not.

Amana does not and cannot argue that an intercircuit conflict has developed in the two years since this Court's 2003 *State Farm* decision. Instead, as its third argument, Amana attempts to categorize circuit court decisions since *State Farm* in terms of various "approaches" to punitive damages. Pet. 21. Even if they accurately characterized the decisions, the "approaches" identified by Amana would not constitute a basis for certiorari. *See* Sup. Ct. R. 10. *But cf. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 125 S. Ct. 542, 547 (2004) (granting certiorari to resolve intercircuit conflict regarding whether the likelihood of confusion bars a fair use defense to a trademark infringement claim).

What is more, the "approaches" identified by Amana mischaracterize the analysis of the circuit courts. While Amana suggests that Fifth Circuit is concerned only with applicable civil penalties (Pet. 23), the Fifth Circuit case cited by Amana expressly acknowledges a court's obligation to apply all three *Gore* guideposts. *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). Amana implies that the Ninth Circuit will permit any punitive award "so long as the punitive-to-compensatory damage ratio is less than ten-to-one" (Pet. 24). In fact, the Ninth Circuit expressly acknowledges this Court's continued refusal to adopt a bright-line ratio. *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004). Amana unfairly criticizes the Federal Court's analysis as a "superficial and simplistic approach" (Pet. 25)

notwithstanding the fact that the Federal Circuit decision cited by Amana is based on an application of three *Gore* guideposts. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1369-72 (Fed. Cir. 2003).

As Amana's own authority demonstrates, the circuit courts are following this Court's punitive damages jurisprudence when determining the constitutionality of punitive awards. The guidance that Amana contends is necessary has already been provided by this Court, as recently as its 2003 *State Farm* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

AMANA COMPANY, L.P. doing business as AMANA APPLIANCES, INC.,

Petitioner,

v.

EDEN ELECTRICAL, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE GRANTED 2

I. This Case Exemplifies The Current Disarray In Punitive Damages Review 2

II. The Punitive Damages Award In This Case Is Unsupportable Under This Court's Precedents 5

III. There Is Disagreement And Disarray Among The Circuits, Further Necessitating this Court's Review 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732 (3rd Cir. 2004) 9

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Boerner v. Brown & Williamson Tobacco Co., ___ F.3d ___, 2005 WL 30394 (8th Cir. Jan. 7, 2005) 3, 7, 8

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 4

Fabri v. United Technologies Intern., Inc., 387 F.3d 109 (2nd Cir. 2004) 5, 8

Gonzaga University v. Doe, 536 U.S. 273 (2002) 3

Harris v. McRae, 448 U.S. 297 (1980) 5

Kumho Tire, Ltd. v. Carmichael, 526 U.S. 137 (1999) 3

Kyllo v. United States, 533 U.S. 27 (2001) 5

Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) 8

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 5

New York v. Belton, 453 U.S. 454 (1981) 4

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366 (Fed. Cir. 2003) 9

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

STATEMENT OF THE CASE

This case is about a flawed punitive damage review system that enabled a substantial business to recover, in an Iowa diversity case involving the termination of a commercial contract in accordance with its terms, five times the maximum punitive damage award ever before sustained by the Iowa courts. Seeking to deflect attention from this, Respondent Eden Electrical, Ltd. ("Eden") seriously distorts and exaggerates the basis of its recovery. Eden's embellishments are intended to bolster the purported reprehensibility of the actions of Petitioner Amana Company, L.P. ("Amana") under the guideposts established by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Most obviously, Eden pretends that it won below because Amana fraudulently misrepresented that the contract between them was to be "exclusive," "long-term," and "direct." Br. Opp. 3-5.

In fact, the district court disallowed each of these theories as a matter of law before this case reached the jury. The slender legal reed supporting Eden's recovery is the solitary oral statement of an Amana official that Amana was entering into the contract in "good faith," a theory that Eden never pled and objected to at trial. To the extent that Eden complains of misrepresentations other than the oral "good faith" statement, *see, e.g.*, Br. Opp. 4, it asks this Court to accept its punitive award on the basis of conduct unconnected to the legal ground for Amana's liability. *See State Farm*, 538 U.S. at 422-23.

Eden's suggestion in a footnote that Amana's mere act of entering into the distributorship agreement with Eden

was itself an affirmative misrepresentation, Br. Opp. 7 n.6, does not comport with the law of Iowa or anywhere else. Such a theory would convert most ordinary breach of contract cases into fraud cases even where, as here, sophisticated parties agree that the contract can be terminated on short notice for any reason or no reason. Notably, the jury found against Eden on its fraudulent nondisclosure claim.

At bottom, Eden does not, and cannot, contest that the act that allegedly injured it was the termination of a contract consistent with a termination provision – reviewed by Eden's counsel prior to contracting – which permitted Amana to terminate the agreement "at any time for any reason" upon the giving of the required notice.

Eden also exaggerates the effect of Amana's actions. Its business did not "collapse." Br. Opp. 6. To the contrary, the district court found that even after the events depicted in this lawsuit, Eden remained a "large, successful enterprise." App. 33.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. This Case Exemplifies The Current Disarray In Punitive Damages Review.

Eden makes no serious attempt to dispute the central reason why this Court should grant certiorari: The lower courts are in a state of chaos regarding their regulation of punitive damage awards under the constitutional principles this Court set down in *Gore* and *State Farm*. Eden's virtual concession of this state of judicial disobedience and discord is the most telling feature of its Brief in Opposition. Under

the law today there can be little doubt, and Eden does not dispute, that the same punitive damages case can come out very differently depending on which appellate court, or which panel of an appellate court, hears the case.

New examples continue to surface. Since the filing of Amana's instant petition, for example, the Eighth Circuit decided *Boerner v. Brown & Williamson Tobacco Co.*, ___ F.3d ___, 2005 WL 30394 (8th Cir. Jan. 7, 2005), a tobacco wrongful death case in which the Eighth Circuit reduced punitive damages from $15 million to $5 million against a compensatory damages award of slightly over $4 million. As a strident concurrence in that case explained, the Eighth Circuit's constitutional punitive damages analysis in *Boerner* is absolutely irreconcilable with the Eighth Circuit's decision in the instant case below. *Id.*, 2005 WL 30394 at *8-9.

Eden simply asks this Court to assume that lower courts know and apply the law in this area. Br. Opp. 14. But as this Court knows too well, lower courts acting with the best of intentions can still reach widely disparate results. This is particularly true in an area such as punitive damages where facts portrayed as extreme can have an emotional effect on any tribunal. This Court can, does, and should grant certiorari in cases where this Court appears to have settled the law but the application of those precedents by lower courts demonstrates otherwise. *See, e.g., Gonzaga University v. Doe*, 536 U.S. 273, 278 (2002) (granting certiorari where lower courts, applying same decisions of Supreme Court, reached differing conclusions about right to sue under the Family Educational Rights and Privacy Act; "our opinions in this area may not be models of clarity"); *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137, 146 (1999) (granting certiorari "in

light of uncertainty among the lower courts" regarding the reach of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); *New York v. Belton*, 453 U.S. 454, 458 (1981) (granting certiorari regarding search incident to arrest doctrine because "[a]lthough the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases").

Rather than dispute the central premise underlying Amana's petition, Eden instead attacks Amana's proposed rules. Amana first proposes that this Court hold that in cases of substantial compensatory damages, a punitive damage award in excess of the compensatory damages, to be upheld on review, must be supported by a particular judicial finding under each of the three *Gore/State Farm* guideposts and the five subparts of the reprehensibility guidepost – something that was wholly lacking in this case. *State Farm*, 538 U.S. at 418-19.

Apparently unable to develop a principled opposition to this rule, Eden grossly mischaracterizes it as a sea change in the standards used to evaluate the constitutionality of punitive damages awards. Br. Opp. 11, 16. Plainly the proposed rule does no such thing. To the contrary, the rule is simply a procedural mechanism to assure that reviewing courts regularly do what many fail to do now: Consider and apply each part of this Court's *Gore/State Farm* analysis.

Amana's second proposed rule would have the largest previous punitive damage award affirmed by the highest court of a state become the presumptive ceiling for federal punitive damages awards where that state's substantive law forms the basis of recovery. Pet. Cert. 14. Eden's

attack on this rule depends on Eden's mischaracterization of the rule as rigidly binding. Like the first rule, however, this rule is merely a presumption which can be overridden. Presumptions are hardly strangers to constitutional analysis. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 32 (2001) (warrantless searches are presumptively unconstitutional); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983) (differential regulation of the press is presumptively unconstitutional); *Harris v. McRae*, 448 U.S. 297, 312 (1980) (a law which "impinges upon a fundamental right explicitly or implicitly secured by the Constitution . . . is presumptively unconstitutional").

Moreover, using the highest award upheld under federal constitutional principles by a state court of last resort, as the Second Circuit has already done in *Fabri v. United Technologies Intern., Inc.*, 387 F.3d 109 (2nd Cir. 2004), comports with the very function that due process limitations on punitive damages are meant to fulfill: It provides notice to potential tortfeasors of the penalties to which they might be subject for their conduct. *State Farm*, 538 U.S. at 417; *Gore*, 517 U.S. at 574.

II. The Punitive Damages Award In This Case Is Unsupportable Under This Court's Precedents.

Eden lauds the Eighth Circuit for its "in-depth analysis" of the punitive damages issue in this case. Br. Opp. 19. Eden can hardly be reading the same opinion. No amount of majestic characterization can add weight to the dismissive four-paragraph treatment of punitive damages in this $10 million case. App. 5-8.

Far from being a factbound misapplication of established law, the Eighth Circuit's opinion contains a series of legal errors. Among them:

- The Eighth Circuit ignored this Court's plain statement that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. Here compensatory damages exceeded $2 million.

- The Eighth Circuit ignored the requirement that five different components are to be considered in an evaluation of the reprehensibility of a defendant's conduct. Instead, it focused solely on one reprehensibility factor, trickery and deceit. *Compare State Farm*, 538 U.S. at 419 (citing *Gore*), *with* App. 6-7.

- The Eighth Circuit ignored the third *Gore* guidepost entirely, *i.e.*, the equivalent civil penalties prescribed under state law. *See State Farm*, 538 U.S. at 428 (citing *Gore*). This was a telling omission, since no Iowa punitive statute whatsoever applies to the conduct alleged in this case.[1]

The Eighth Circuit's mishandling of punitive damages here is emblematic of what happens in too many courts: A substitution of lip service to *Gore* and *State Farm* in place of the reviewing court actually *applying* and *following*

[1] Notwithstanding its reference to a citation by Amana's former counsel to a fraud statute in the district court, Eden does not dispute that no Iowa civil or criminal statute, including the statutes cited by the district court, applies to this case. Br. Opp. 20 n.13.

Gore and *State Farm*. It is true, for example, that the Eighth Circuit mentioned the third *Gore* guidepost in a rote listing of the guideposts. App. 5-6. The Eighth Circuit never applied that guidepost to this case, however, notwithstanding Eden's mischaracterization to the contrary. Br. Opp. 9, 20.

The Eighth Circuit's error in this case is made even more clear by its recent decision in *Boerner*. In *Boerner*, a wrongful death case, the plaintiff's decedent suffered "a most painful, lingering death" from lung cancer as a result of using the defendant's cigarettes. As the court explained:

> Pall Mall cigarettes were extremely carcinogenic and extremely addictive – substantially more so than other types of cigarettes; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous to the user's health; and American Tobacco actively misled consumers about the health risks associated with smoking.

Nonetheless, in light of the plaintiff's $4,025,000 compensatory damage recovery, the court reduced punitive damages from $15 million to $5 million, concluding that "a ratio of approximately 1:1 would comport with the requirements of due process." *Boerner*, 2005 WL 30394 at *7.

Attempting to reconcile that decision with its earlier decision here, the Eighth Circuit stated that "there is no evidence that anyone at American Tobacco intended to victimize its customers." *Id.* The Eighth Circuit's distinction of *Eden* made no sense, however. *Boerner* involved physical harm, American Tobacco's callous disregard for the health and safety of others, repeated incidents of

wrongful conduct spanning decades, and calculated deceit. As a concurring judge observed, "I find no principled basis for concluding this award is excessive when compared with our affirmance of the punitive damage award in *Eden*." *Id.* at *9.

Boerner illustrates the extent to which the lower courts are spinning new doctrines and rules concerning punitive damage review – and why direction from the Court is so badly needed. In the Eighth Circuit, "intent to victimize" (whatever that means) apparently has become the latest lodestar. It means that a thriving business that entered into a commercial contract and was terminated in accordance with that contract can recover $10 million in punitive damages, while a victim who slowly died of lung cancer is limited to $5 million.

III. There Is Disagreement And Disarray Among The Circuits, Further Necessitating This Court's Review.

If the Eighth Circuit were the only lower court to encounter difficulty in performing a coherent and consistent punitive damage review, this might be a different petition. But the Eighth Circuit is far from alone. As we have demonstrated in the petition, the approaches taken by the different circuits run the gamut. One court treated the applicable civil penalty as the outer limit for punitive damages. *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003). Another court, whose decision is not mentioned in Eden's opposition, held that it would be unconstitutional to uphold a larger punitive award than had previously been upheld by the courts of the state whose law was being applied. *Fabri*, *supra*. Still another court reduced a punitive

award to $2,025,000 in order to maintain a 1.5:1 punitive/compensatory ratio in a commercial case involving large compensatory damages. *2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732 (3rd Cir. 2004). By contrast, the Federal Circuit in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), held that a $50 million punitive award in a case involving $15 million in actual damages "does not even approach the possible threshold of congressional impropriety" because there was sufficient evidence to support a jury finding that the defendant had "committed actual fraud." *Id.* at 1371-72. In other words, for the Federal Circuit, any actual fraud finding can sustain $50 million in punitive damages, so long as the compensatory damages were substantial.

Eden appears to argue that the lower courts are consistent in their approach because they consistently make reference to *Gore* and *State Farm*. Br. Opp. 22-23. But citation of precedent or a mechanical recitation of guideposts is far different from being bound by that precedent. As the Eighth Circuit did here, too many courts pay lip service to *Gore* and *State Farm* without following the directions this Court gave in those cases. Eden mimics the superficiality of some of these lower courts when it claims that those courts need no "guidance" in this area. Br. Opp. 23.

CONCLUSION

This Court should grant a writ of certiorari and reverse the judgment and decision of the United States Court of Appeals for the Eighth Circuit regarding punitive damages.

Respectfully submitted,

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